

Exhibit No. __ (PC-7)
Docket TR-150189
Witness: Paul Curl

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY

Petitioner

v.

WHATCOM COUNTY

Respondent.

DOCKET TR-150189

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EXHIBIT TO
TESTIMONY OF

PAUL CURL

STAFF OF
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

*Commission Orders in Dockets TR-940282 – BNSF v. Skagit County (Boe Rd./Green Rd.)
TR-940330 – BNSF v. City of Ferndale (Thornton Rd.)
TR-010194 – BNSF v. Snohomish County (156th St. NE)
TR-070696 – BNSF v. City of Mount Vernon (Hickox Rd.)
TR-090121 – BNSF v. Snohomish County (Logen Rd.)
TR-140382/TR-140383 – BNSF v. Yakima County (Barnhart Rd./N. Stevens Rd.)*

September 21, 2015

SERVICE DATE
DEC 13 1996

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Burlington Northern Railroad Co.,)
)
Petitioner,)
v.)
Skagit County, Washington,)
)
Respondent.)
)
.....)

DOCKET NO. TR-940282

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND ORDER CLOSING GREEN
ROAD CROSSING AND
GRANTING LEAVE TO WITH-
DRAW PETITION AS TO
FOUR CROSSINGS

NATURE OF PROCEEDING: This is a petition to close six railway-highway crossings at grade.

PROCEDURAL STATUS: Hearings were held on two crossings, Boe Street and Green Road, on February 23 and 24, 1995, in Mt. Vernon, before Administrative Law Judge Lisa A. Anderl of the Office of Administrative Hearings.¹ At hearing, Skagit County expressed concerns about closure of the Green Road crossing, and several members of the public testified in opposition to closure of that crossing. The County withdrew its opposition to closure of the Boe Street Crossing. The Commission entered an order closing the Boe Street crossing on May 26, 1995. The hearing on the Green Road crossing was continued pending completion of a Commission Staff determination of whether there is an environmental impact of closing the crossing; that determination since has been made. Subsequent to the hearing, Skagit County and the petitioner entered into an agreement to close the Green Road crossing, and Skagit County has withdrawn its opposition to closure. The petitioner, the respondent, and counsel for Commission Staff have waived an initial order so that the record may proceed directly to consideration by the Commission. Petitioner has requested leave to withdraw its petition as to the four crossings that did not go to hearing.

COMMISSION: The Commission grants leave to withdraw the petition as to the four crossings that did not go to hearing. The Commission grants the petition to close the Green Road crossing, conditioned on the construction of a cul-de-sac on Green Road at the point of closure. All crossings at grade are inherently dangerous, and this one is especially hazardous. The crossing is a convenience to residents and business people in the vicinity, but a safer alternate crossing is available. The need for the crossing is not so great that it must be kept open despite its dangerous condition.

¹ The petitioner 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.

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[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

* 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.

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.

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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.

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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).

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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.

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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.

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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 SE $\frac{1}{4}$ of the SE $\frac{1}{4}$, 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.

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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.

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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.

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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

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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

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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

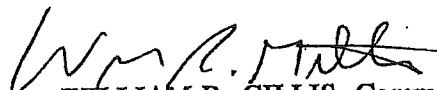
THE COMMISSION ORDERS That the request of Burlington Northern Railroad Company for leave to withdraw the petition to close the Milltown Road, Spruce Street, West Johnson Road, and West Stackpole Road grade crossings is granted.

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).

SERVICE DATE

MAR 31 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.

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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 Strelbel, 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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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).

SERVICE DATE
 NOV 18 1994

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

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BURLINGTON NORTHERN RAILROAD COMPANY,)	
)	
Petitioner,	)	DOCKET NO. TR-940330
)	
vs.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
CITY OF FERNDAL, E, WASHINGTON,	)	AND INITIAL ORDER
	)	GRANTING PETITION
Respondent.)	
.....)	

Hearings were held in this matter in Ferndale on October 12 and 13, 1994, before Administrative Law Judge Lisa A. Anderl of the Office of Administrative Hearings. The parties filed briefs by November 7, 1994.

The parties appeared and were represented as follows:

- PETITIONER: BURLINGTON NORTHERN RAILROAD CO.
By Rexanne Gibson, attorney
110 - 110th Ave. NE, Suite 670
Bellevue, Washington 98004
- RESPONDENT: CITY OF FERNDAL E
By Gary Cuillier, attorney
P.O. Box 1126
Ferndale, Washington 98248
- COMMISSION: WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
By Ann Rendahl, assistant attorney general
1400 S. Evergreen Park Dr. SW
P.O. Box 40128
Olympia, Washington 98504-0128

MEMORANDUM

Proceedings

This case concerns the proposed closure of the Thornton Road railroad crossing in the City of Ferndale. On March 10, 1994, Burlington Northern Railroad Company (Burlington or the railroad) petitioned the Commission for closure of this crossing,

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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. Commission Staff supports closure of the crossing as required by the public safety.

The closure was protested by the City of Ferndale 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 of Ferndale. 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, but the Commission did authorize the administrative law judge to rule on further motions regarding consolidation.

Post-Hearing Briefs and Motions

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

The City of Ferndale 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 Strebek, 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 if the City's concerns are to be accorded any weight at all.

Burlington Northern and 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.

Reopening is authorized under RCW 81.04.160 and WAC 480-09-820(2). In accordance with that regulation, reopening may be requested after the close of the record and before a final order. The petition in this case was thus timely filed.

The rule further 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

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reasonably discoverable at the time of the hearing, or for any other good and sufficient cause. WAC 480-09-820(2)(b).

In this case, 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. 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 petition to reopen is denied.

The Crossing

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, as described through testimony at the hearing, currently serves two property owners, both of which are 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. A map of the city, showing the crossing, is attached as Attachment A.

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

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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. 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. This route is also the main access to I-5, for both north and southbound traffic. Closure of the crossing would not affect the current traffic patterns.

Public Need for the Crossing

The City is in the process of planning for growth and development over the next 15-20 years. As part of that plan, the City is considering extending Thornton Road southward from where it now dead-ends. Under the plan, Thornton would connect with Portal Way, immediately to the south of the freeway ramps which allow exit from and entrance to southbound I-5. This proposal is illustrated in exhibit #4. The City and the residents feel 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.

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

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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 (WSDOT) 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 following witnesses appeared for the petitioner: Wayne Hatton, vice-president of transportation for Burlington; Kenneth Cottingham, consulting transportation engineer; Robert Scieszinski, supervisory specialist for signal and train control with the Federal Railroad Administration; Russell Frazier, manager of signal maintenance for Burlington; James Kime, manager of operating practices for Burlington; Marvin Nelson, senior manager of engineering for Burlington. In addition, the petitioners in Docket TR-940308 presented the following witnesses, whose testimony was also considered in this matter: Alden Clark, senior director of contract operations for Amtrak; Edward Quicksall, transportation manager for western division #710 for Amtrak; Robert Josephson, manager of local planning and coordination for the WSDOT; Gilbert Mallery, rail branch manager for the WSDOT.

5. The City called the following witnesses in opposition to the petition to close the Thornton Road crossing: Yvonne Goldsmith, City council member; Darrell Ashe, City council member; John Eley, director of public works for the City; Michael Birdsall, consultant in transportation planning; Stan Strebel, City manager. The City does not oppose the petition to increase passenger train speed limits.

6. Commission Staff called the following witnesses in this matter: Allen Dickson, motor carrier law enforcement investigator; Gary Harder, rail carrier compliance specialist; Alan Scott, rail section operations manager.

7. 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. Most public witnesses favored a grade crossing at Thornton, but some had no preference between a grade crossing or an over crossing. A few expressed support for high speed rail transportation and Amtrak's proposed service, including the higher speed limits. Others felt that the current 50 m.p.h. speed limit was fast enough and that 70 or 79 m.p.h. through the corporate limits is just too fast.

8. 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

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Way near the southbound ramps to and from I-5. 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. The estimate of the total cost of construction is about \$4 million. Another option, an overpass over the tracks and I-5, is estimated to cost \$6 million.

9. During floods, water blocks access to and from Ferndale over many of the main streets. The proposed Thornton Road extension is located in a flood storage area. The extension would intersect with Portal Way within 80 feet of the freeway interchange, making traffic very congested at that intersection and virtually unnavigable by big trucks turning left from Thornton onto Portal and left again onto the ramp to I-5. The area through which the new road would go is planned as manufacturing or industrial, with likely use by large vehicles if the extension is built.

10. Commission Staff supports the petition to close Thornton Road, but argues that 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.

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, 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

IT IS HEREBY ORDERED That the petition of Burlington Northern Railroad Company for closure of the at-grade crossing at

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allow those property owners to continue to use the tracks as a private crossing.¹

As noted above, there was extensive testimony about the City's potential or future need for the crossing. This order concludes 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, this initial order 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.

Other Issues

In addition to the safety and public need issues discussed above, the City argues two other points. First, that the railroad should be required to consider an alternate location for its siding track. Second, that an order closing the crossing would contravene the Growth Management Act, RCW 36.70A.103.

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 seems like a reasonable additional safety precaution and will be recommended by this order.

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.

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As noted above, the City cites no authority for the proposal that an alternate location for the siding track is an issue which could be decided in the scope of this proceeding or even within the Commission's jurisdiction. For the reasons discussed in the section of this order denying the petition to reopen, this issue will not be given further consideration.

RCW 36.70A.103 provides, in general terms, that actions of State agencies may not contravene comprehensive plans adopted in accordance with the Growth Management Act. However, Ferndale has not adopted a comprehensive plan, so this argument has no bearing on this case.

Conclusion

This order 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 matter, and having stated findings and conclusions, the undersigned Administrative Law Judge 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. 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.

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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 initial order does not need to decide the best plan for the City to follow -- that is uniquely the province 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.

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 below, 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.)

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Petitioners point out that these conditions are all present at the Thornton Road crossing and support an order to close the crossing.

Issue

Does the public convenience and need for the crossing outweigh public safety concerns and the public policy against crossings at grade?

Discussion

Burlington has requested closure of the crossing and this position is supported by Commission Staff. The City of Ferndale opposes closure, as do most of the public witnesses who testified.

The issue, in accordance with the standard set forth in RCW 81.53.060, is whether the public safety requires that the crossing be closed. This is an at-grade crossing, so the analysis starts with the premise that the crossing is dangerous. The courts and the Commission have held that all railroad grade crossings are dangerous and that public policy disfavors crossings at grade. Tonasket v. Burlington Northern, Docket No. TR-921371 (December 9, 1993). 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 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.

This initial order finds 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 the residences on the east side of the tracks, and Burlington will

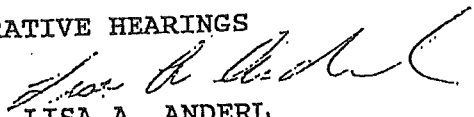
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Thornton Road in the City of Ferndale is granted, on condition that the railroad provide access to those properties located to the east of the tracks which would be landlocked by the closure, including the use of a crew member to flag traffic across when a train is split at the crossing.

DATED at Olympia, Washington, and effective this 18th day of November, 1994.

OFFICE OF ADMINISTRATIVE HEARINGS


LISA A. ANDERL
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., P. O. 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.

ATTACHMENT A

Ferndale, WA

1 mile

Base Map: US Census Bureau TIGER/Lite Map
Railroad Information: BN Databases
Proposals shown in magenta

Extend siding 3,631'
New Passing Track = 8,600'

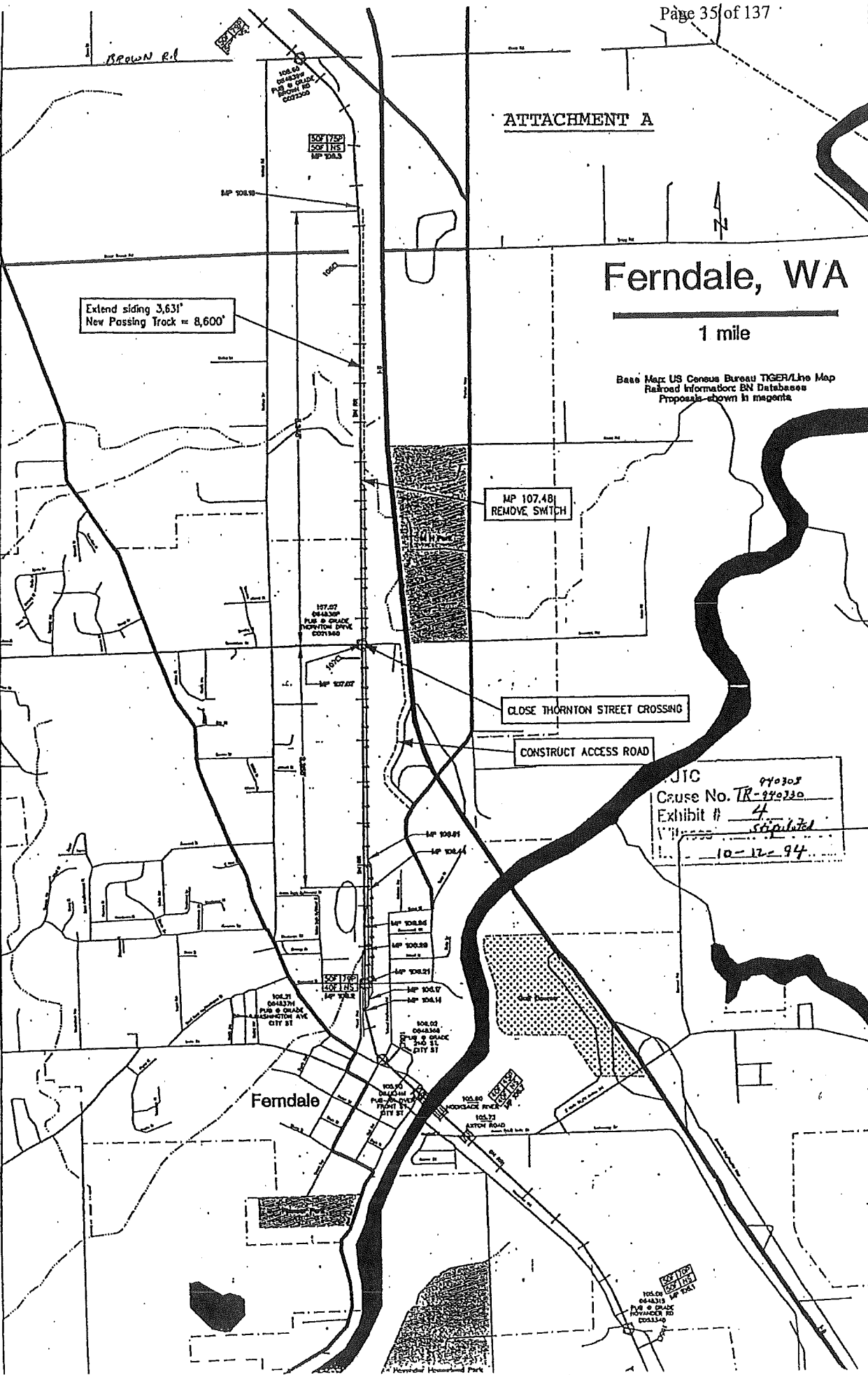
MP 107.48
REMOVE SWITCH

CLOSE THORNTON STREET CROSSING

CONSTRUCT ACCESS ROAD

JTC
Cause No. TR-970308
Exhibit # 4
10-12-94

Ferndale



BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

THE BURLINGTON NORTHERN	)	DOCKET NO. TR-010194
SANTA FE RAILWAY,)	
)	
Petitioner)	
)	
v.)	
)	
SNOHOMISH COUNTY,	)	ORDER GRANTING PETITION
)	
Respondent.)	
)	
.....)	

1 *Synopsis: In this order, the Commission grants a petition by the Burlington Northern & Santa Fe Railway Company to close a grade crossing located at 156th Street N.E. at railroad milepost 44.78 in Snohomish County, north of Marysville, Washington. In doing so, the Commission accepts and adopts a settlement agreement among the parties that provides for conditions on the crossing closure.*

I. PROCEDURAL HISTORY

2 **Notice and Hearing.** This matter was heard in Everett, Washington on October 11 and 12, 2001, before Administrative Law Judge Marjorie Schaer, pursuant to due and proper notice to all interested parties. A prehearing conference was heard on October 10, 2001, in Olympia, Washington. Public testimony was heard on the evening of October 11, 2001, in Silvana, Washington. A post-hearing hearing was heard in Olympia on December 10, 2001. A hearing for the presentation of a proposed settlement and questioning of witnesses was heard in Olympia on January 15, 2002.

3 **Parties:** Robert E. Walkley, Attorney at Law, Sammamish, Washington, and Rexanne Gibson, Kroschel Gibson Kinerk Reeve, LLP, Bellevue, Washington, represent the Burlington Northern and Santa Fe Railway Company (BNSF). Jason Cummings, Deputy Prosecuting Attorney, Civil Division, represents Snohomish County (the County). Jonathan C. Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Staff). Jeffrey D. Stier, Assistant Attorney General, Transportation & Public Construction Division, Olympia, Washington, represents the Washington State Department of Transportation (WSDOT).

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4 **Procedure:** This matter arose upon a petition filed by the BNSF on February 8, 2001, of closure of a railway-highway at-grade crossing of BNSF tracks at railroad milepost 44.78 in Snohomish County, north of Marysville, Washington. The County opposed the closure, and the matter was set for hearing. The Washington State Department of Transportation intervened. The matter was heard before Administrative Law Judge Marjorie Schaer on October 11 and 12, 2001, in Snohomish County. Following the hearing, the parties engaged in negotiations regarding the proposed crossing closure and conditions proper for effecting the closure. On January 15, 2002, the parties filed with the Commission a proposed settlement agreement that they contend resolves all issues in the proceeding, consistent with pertinent law and with the public interest. A hearing for the presentation of the proposed settlement and questioning of witnesses was held in Olympia, Washington on January 15th, 2002. The parties waived an initial order, asking that the proposal for settlement and the record be forwarded directly to the Commission for action.

5 **Commission:** The Commission finds that the proposed settlement agreement is consistent with law and with the public interest. The Commission adopts the proposed agreement as its own resolution of the issues in the proceeding. The Commission incorporates the Parties' Settlement Agreement by reference and makes it a part of this order. *Appendix A, infra.*

II. DISCUSSION AND DECISION

6 BNSF owns and maintains a mainline track in the vicinity of the 156th Street Crossing and operates freight trains on it. This Railway line is a federally designated High Speed Rail Corridor and passenger trains are also operated by the National Passenger Railroad Corporation (Amtrak) on BNSF tracks in the vicinity of the 156th St. Crossing.

7 The Petitioner proposes to construct a siding in the vicinity of the crossing that will permit trains to pass. The crossing would interfere with operation of the siding and, if the siding were constructed without closure of the crossing, the results would include frequent delays to vehicle traffic at the crossing and an increased risk of accident because trains standing on the siding would interfere with crossing users' view of oncoming train traffic.

8 The nearest crossing to 156th Street is at 172nd Street, more than a mile away. Public and County witnesses cited not only the inconvenience in the proposed closure, but also the danger in requiring a longer route in some instances for emergency response.

9 Mr. Ahmer Nizam, a rail engineer with Commission Staff, recommended a conditional closure. The conditions proposed by Staff included the construction of

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cul-de-sacs on 156th Street in order to allow vehicles entering the street to turn around and exit. The second condition recommended by Staff was that some access should be retained that could be opened up as a temporary public route in the event that the 172nd Street crossing is unavailable due to a cataclysmic event.

10 The parties to this proceeding, but for Staff, have submitted a proposed settlement agreement that was included in the record as Exhibit 65, which is attached to this order and included in this order by this reference. Staff is not a party to this settlement agreement, but Mr. Nizam testified at the January 15, 2002, hearing that he had reviewed Exhibit 65, and that the Settlement Agreement not only meets the conditions he recommended at the October 12, 2001, hearing, but in some ways exceeds them.

11 The proposal addresses the need to close the crossing to accommodate construction of the siding. The Commission has no jurisdiction to affect construction of the siding, and it sees no reason to conclude that the siding will not be built. The change in circumstances at the crossing, with construction of the siding, renders the crossing substantially less convenient and substantially less safe. Under those circumstances, the crossing should be closed.

12 The proposed settlement agreement addresses several aspects of the closure to provide mitigation for certain costs and inconveniences. It provides for temporary measures in the event of emergency closure of the 172nd St. crossing; it provides for financial assistance to the County for closure; and it anticipates the possibility of a grade-separated crossing in the future near the present 156th St. crossing.

13 On balance, we conclude that the existing crossing would become unacceptably unsafe upon construction of the proposed siding, and we accept and adopt the proposed settlement as a proper means to resolve the issues in the proceeding. The parties are commended for finding an appropriate resolution of the matter.

III. FINDINGS OF FACT

- 14 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington having jurisdiction over railway-highway crossings at grade.
- 15 (2) The nearest crossing to 156th St. is at 172nd street. Closing 156th St. and diverting traffic to 172nd St. would increase driving distances and times for some traffic, including emergency vehicles.

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- 16 (3) The BNSF plans to construct a rail siding that would cross 156th St. at the site
of the existing 156th St. crossing. A siding would increase the incidence of
delay at the location of the crossing and would increase danger to persons
using the crossing.
- 17 (4) Six members of the public testified at the public hearing regarding closure of
the crossing. All opposed it because of increased time and distance for some
travelers and for emergency vehicles in some instances. Twelve members of
the public submitted letters regarding the crossing to the Commission or to the
County. All of the letters opposed closure of the crossing.
- 18 (5) The proposed settlement offered by the parties on January 15, 2002, provides
for closure of the crossing and for funding of roadway modifications necessary
to render the location of the former crossing safe.

IV. CONCLUSIONS OF LAW

- 19 (1) The Washington Utilities and Transportation Commission has jurisdiction over
the parties and subject matter of these Applications.
- 20 (2) The construction of a siding at the location of the 156th St. crossing would
render the crossing substantially less convenient and substantially less safe
than its present configuration.
- 21 (3) The closure of the 156th St. crossing is consistent with the public interest and
is required by the public safety, consistent with under Chapter 47.79 RCW.
- 22 (4) The Commission has the authority to approve settlement agreements pursuant
to WAC 480-09-466.
- 23 (5) The proposed settlement agreement is consistent with the public interest and
results in resolution of all significant issues relating to the crossing closure.
Adoption of the terms of the proposed agreement in this Order is consistent
with the public interest. The Commission should adopt the proposed
settlement agreement.

V. ORDER

- 24 (1) The Commission approves and adopts as its own for purposes of this
proceeding the parties' proposed settlement of the issues set out in Appendix
A.

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- 25 (2) The Petition of the Burlington Northern and Santa Fe Railway to close the
crossing of its tracks and 156th St. in Snohomish County, Washington, is
granted.
- 26 (3) The Commission retains jurisdiction to effectuate the terms of this order.

DATED at Olympia, Washington, and effective this _____ day of March, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK OSHIE, Commissioner

NOTICE TO ALL 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 ten (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 480-09820(1).

RECEIVED
RECORDS MANAGEMENT
STATE OF WASHINGTON
UTILITY AND TRANSPORTATION
COMMISSION
JAN 15 11 4: 38 AM

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is entered into as of the date below by and among THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation ("BNSF"); SNOHOMISH COUNTY, a political subdivision of the State of Washington ("County"); and the WASHINGTON STATE DEPARTMENT OF TRANSPORTATION ("WSDOT"); hereinafter collectively "the Parties."

WHEREAS, BNSF filed a petition (Docket No. TR-010194) with the Washington Utilities and Transportation Commission ("WUTC") for authority to close the at-grade railroad/highway crossing at 156th Street NE in Snohomish County, Washington ("Crossing"); and,

WHEREAS, the County opposed the closure and, on October 11-12, 2001, the cases for BNSF, the County, WUTC Staff, Intervenor WSDOT, and comments of the public, were presented to Administrative Law Judge Marjorie Schaer. The matter is now awaiting briefing and a decision by the WUTC; and,

WHEREAS, the parties now desire to settle this matter by stipulating to an order for closure and providing for the construction by the County of certain improvements that will be beneficial to public safety in the general vicinity of the Crossing.

NOW, THEREFORE, for and in consideration of the mutual promises herein contained to be kept, observed and performed, the Parties agree as follows.

1. **Closure.** The County will withdraw its opposition to the closure of the Crossing. The Parties will request that the WUTC issue an order consistent with this Agreement authorizing permanent closure of the Crossing. The WUTC order shall provide direction as to the proper disposition of the existing railroad signals and gates at the Crossing and provide further that:
 - a. BNSF will have complete discretion regarding the actual timing for the physical closure of the Crossing not earlier than June 16, 2002 (the close of school in the vicinity) subject to all other applicable terms and conditions of this Agreement; and
 - b. BNSF will have full authority at the time of the closure of the Crossing to close the roadway across the railroad and to remove roadway and other material, but BNSF will not construct any elements of the siding across the area occupied by the Crossing until after the Crossing is physically closed by BNSF.
2. **Monetary Payments to Snohomish County.** Subject to the conditions set forth in Section 7 of this Agreement, the County will be paid Four Hundred Thousand Dollars (\$400,000) to perform work in the vicinity of the Crossing as described in Section 3

of this Agreement. Payment of that Four Hundred Thousand Dollars (\$400,000) sum to the County shall be construed as satisfying any and all obligations of BNSF and Intervenor WSDOT associated with the Crossing closure.

3. **Projects.** The work of the County referenced in Section 2 of this Agreement may include the following projects, but the County reserves the right to modify and/or delete any of the following projects so that the overall costs do not exceed \$400,000:
 - a. **Traffic Signals.** The County will coordinate with WSDOT for the construction of a strain wire traffic signal with turn pockets at the intersection of SR-531 (172nd St. NE) and 27th Ave. NE. It is anticipated that the strain wire signal and turn pockets will ultimately be replaced with expanded facilities as part of WSDOT's longer range plans for SR-531, but such work is not part of this agreement and it is not the intent of this agreement to bind any of the parties to any additional contributions or obligations associated with additional or future improvements to SR 531 or the intersection of SR-531 and 27th Ave. NE. The parties agree that this signal has independent utility with or without the proposed closure.
 - b. **Signage and Public Notice.** The County will post "No Outlet" or "Dead End" signs at locations deemed appropriate by the County in the vicinity of the Crossing.
 - c. **New Radius.** The County will acquire the necessary property rights and permits and will construct a new turn radius in the intersection of 23rd Ave. NE and 156th St. NE.
 - d. **Gates.** The County will erect one (1) locked steel gate at or near the east side of the new intersection to be constructed at 23rd Ave. NE and 156th St. NE. BNSF will provide fencing or other suitable barriers on the right-of-way line on both sides of the Crossing.
 - e. **Cul-de-Sac.** The County will acquire the necessary property rights and permits and will construct a cul-de-sac on the east side of the Crossing.

The County will fully account for expenditures made in accordance with all applicable laws and regulations. If the foregoing projects can be completed for less than \$400,000, the County may apply any surplus balance to other appropriate safety improvements associated with the impacts of the Crossing closure. In that event, the County will use due diligence to utilize any such surplus for Section 130-eligible work.

4. **Manner of Payment.** The Section 2 payment obligations to the County shall be funded from a combination of funding sources including monies paid by BNSF or by WSDOT as administrator of the 23 USC Section 130 ("Section 130") Federal Highway Administration program that shall never exceed Four Hundred Thousand Dollars (\$400,000) in the aggregate and shall be satisfied in the following manner

once all applicable preconditions set forth in Section 7 of this Agreement have been satisfied:

- a. Up to Two Hundred Fifty Thousand Dollars (\$250,000) of Section 130 funds will be paid upon a reimbursable basis for the County's work on Section 3 projects. The County will prioritize its Section 3 projects to assure maximum eligibility for Section 130 funding and will exercise all due diligence to assure that Section 130 funds will be made available to permit project completion in a timely manner for any, or all, of the Section 3 work under this Agreement. The County shall be entitled to conduct work for Section 3 projects immediately upon receipt of a notice to proceed from the administrator of the 23 USC Section 130 Federal Highway Administration program under a Local Agency Agreement, subject to the priority schedule set forth in Section 5 below;
- b. One Hundred Fifty Thousand Dollars (\$150,000) shall be paid directly by BNSF to the County promptly upon satisfaction of applicable conditions contained in Section 7 of this Agreement.
- c. Should there be any shortfall below the Two Hundred Fifty Thousand Dollars (\$250,000) of Section 130 funds referenced in Subsection 4.a. of this Agreement, then BNSF shall be obligated to pay the amount of that shortfall (never to exceed Two Hundred Fifty Thousand Dollars (\$250,000)).

5. Priority of County Expenditures. The County shall be obligated to expend all of the Four Hundred Thousand Dollars (\$400,000) in funding described in Sections 2 and 4 of this Agreement in the following order of priority:

- a. First, for design and permitting activities relating to any, or all, Section 3 Projects and for construction of the Section 3.a. traffic light Project;
 - b. Second, for construction of any, or all, of the remaining Section 3. b. through e. Projects; and
 - c. Third, to any safety improvements in the Crossing area that may be funded with surplus proceeds as authorized under Section 3 of this Agreement.
- 6. Emergency Access.** In the event of a "catastrophic" (24 hrs. or more) shutdown of vehicular and rail traffic at the 172nd at-grade crossing due to a derailment or other railroad emergency, BNSF will provide temporary alternate access across the railroad right-of-way as near to 172nd as reasonable, safe and feasible. This might include the temporarily filling in of the former crossing at 156th to allow passage of vehicles while 172nd is out of service, if that is the most reasonable, safe and feasible temporary measure available under the circumstances. This obligation to provide temporary alternate access across the railroad right-of-way shall become null and void in the event that a grade separated crossing is constructed at or between 152nd St. NE and SR 531.

7. Contingencies and Conditions.

- a. **WUTC.** The Parties recognize that the WUTC, when it formally acts, may or may not decide the case consistent with the terms of this Agreement. In addition to the other conditions precedent herein, the Parties agree that the terms of this Agreement are contingent upon the entry of a final, non-appealed order by the WUTC that does not materially modify, add to, or subtract from the terms of this Agreement, or unduly burden any party hereto.
- b. **Timing for BNSF Payments.** The BNSF payment obligations described in Subsections 4.a. and c. of this Agreement shall become operative and binding at the earliest of:
- i. Issuance of all essential permits and approvals by cognizant agencies necessary for the closure of the Crossing and construction of the new siding without appeal by any person, entity, or party under applicable federal, WUTC, or other laws or rules. "Essential permits and approvals" under this subsection include, but are not limited to, a Determination of Non-Significance, all final permits or actions related to BNSF's "JARPA" application, and all required final action on any modifications or other determinations any state or federal agency may make after notification of the intent of the parties to construct the projects listed above; or, in the alternative,
 - ii. If, after June 16, 2002, BNSF elects to physically close the Crossing before issuance of all essential permits and approvals by cognizant agencies necessary for the construction of the new siding.
- c. **Section 130 Funding-Noninterference with the Timely Completion of BNSF Siding Construction Work.** The parties shall perform the terms of this Agreement in such a manner that BNSF will be able to build its siding project and close and remove the Crossing without delays. Commencement or completion of the work identified in Section 3 above shall not be a condition precedent to the closure of the Crossing. Even though the parties expect that Section 130 funds will be available for completion of Section 3 projects in a timely manner, the availability, or unavailability, of Section 130 funding shall never operate to delay the construction of the siding. If, however, unforeseen events associated with the pursuit of Section 130 funding for some, or all, of the Section 3 projects will delay or prevent the timely completion of BNSF's siding construction project in the 2002 construction season, then BNSF may elect to directly fund some or all of the Section 3 work pursuant to Section 4.c. in lieu of the County's applying for or obtaining Section 130 funding for such work.
- d. **Section 130 Funding-Noninterference with the Timely Completion of Traffic Light Work.** As stated in Section 7.c. of this Agreement, the parties expect that

Section 130 funds will be available in a timely manner and will not create delays in or prevent construction of any Section 3 project(s). If, however, through no fault of the County, the County's applying for or attempting to use Section 130 funds to finance construction of Subsection 3.a, work will delay or prevent completion of such Subsection 3.a. work by August 31, 2002, then:

- i. The County shall be relieved of its obligation to seek Section 130 supplemental funding for the unfunded portion of such work; and
- ii. BNSF shall be obligated under Subsection 4.c. to fund any portion of the Section 3.a. work that has not been funded by Subsection 4.a. and/or 4.b. payments, subject to the \$400,000 total payment limit for all projects from all sources.

SIGNED by duly authorized persons for the Parties this _____ day of January, 2002.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Attest:

Joe Scheffler
Witness

APPROVED AS TO FORM 1/10/02
Weid

[Signature]
By:
Asst Vice President Engineering Services
Title

SNOHOMISH COUNTY

Attest:

Laura Nelson
(Clerk)

for County Executive
Gary Weikel
By:
GARY WEIKEL
Deputy Executive
Title

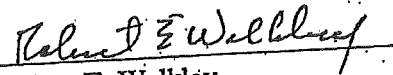
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

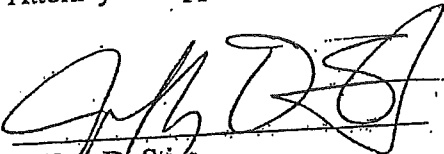
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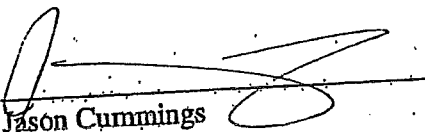
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Rail op & Technical Expert

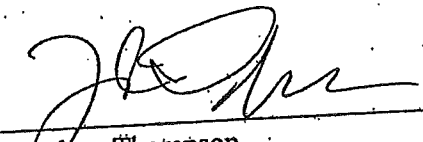
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[Service Date November 4, 2008]

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

BNSF RAILWAY COMPANY,	)	DOCKET TR-070696
)	
Petitioner,	)	ORDER 06
)	
v.	)	FINAL ORDER ON REVIEW,
	)	GRANTING ADMINISTRATIVE
CITY OF MOUNT VERNON,	)	REVIEW; MODIFYING INITIAL
	)	ORDER GRANTING PETITION
Respondent.	)	TO CLOSE HICKOX ROAD
	)	GRADE CROSSING SUBJECT
	)	TO CONDITIONS
.....)	

Synopsis: This Commission Final Order modifies an initial order granting a petition by Burlington Northern Santa Fe Railway Company to close the Hickox Road at-grade railroad crossing in the City of Mount Vernon, Skagit County, subject to conditions. The Final Order affirms a requirement to maintain a private crossing for flood and emergency service access, removes the requirement of farm harvest access and modifies requirements for the private crossing's signals.

I. INTRODUCTION

1 **NATURE OF PROCEEDING.** Docket TR-070696 involves a petition by Burlington Northern Santa Fe Railway Company (BNSF or Burlington Northern) to abandon and close to public use a railroad-highway grade crossing located at Hickox Road, Mount Vernon, Skagit County, Washington (US DOT #084737D) in accordance with RCW 81.53.060. The purpose of the closure is to address safety hazards associated with extension of a siding alongside main line tracks at the location of a crossing.

2 **Appearances.** Bradley Scarp and Kelsey Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represent Burlington Northern (BNSF). Kevin Rogerson, City Attorney, Mount Vernon, Washington, represents the City of Mount Vernon (Mount Vernon or the City). Stephen Fallquist, Civil Deputy Prosecuting Attorney, Mount Vernon, Washington, represents Skagit County (County). Scott Lockwood,

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Assistant Attorney General, Olympia, Washington, represents the Freight Systems Division of the Washington State Department of Transportation (WSDOT), Tumwater, Washington. Thomas Burke, Burke Law Offices Inc., P.S., and Brian Snure, Snure Law Office, PSC, both of Des Moines, Washington, represent Skagit County Fire Protection District No. 3 (Fire District No. 3), Conway, Washington. Gary T. Jones, Jones & Smith, Mount Vernon, Washington, represents David Boon, Yvonne Boon, and Western Valley Farms, LLC (Western Valley Farms or Western Valley). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).

3 **Procedural History.** BNSF initially filed its petition to close the Hickox Road at-grade railroad crossing in Skagit County on April 11, 2007, and the Commission set the matter for hearing.

4 Administrative Law Judge Adam Torem conducted an evidentiary hearing upon due and proper notice to all interested parties, with hearing sessions on January 8, 9, and 10, 2008, in Mount Vernon, Washington and on January 31, 2008, in Seattle, Washington. The Commission also held two hearing sessions to receive public comment in Mount Vernon, Washington, on January 8 and 9, 2008. The Commission received written comments and petitions from over 200 persons, all but one opposing closure of the Hickox Road crossing. The record for decision consists of 140 exhibits and over 1000 pages of transcript.

5 The parties submitted post-hearing briefs on February 15, 2008. The Commission declined a request to allow supplemental briefing.

6 **Initial Order:** Judge Torem found that construction and operation of the siding would result in extraordinary hazards, and proposed that the Commission grant BNSF's petition to close the Hickox Road at-grade railroad crossing to public use, but only subject to the following conditions:

7 (1) BNSF must upgrade the Stackpole Road at-grade crossing (to the south of Hickox Road) with safety measures equivalent to those now in place at the Hickox Road crossing;

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8 (2) BNSF must provide funding for necessary road improvements associated with the closure of the Hickox Road crossing;

9 (3) BNSF must negotiate and enter into a private crossing agreement for limited continued use of the Hickox Road crossing with the local governmental entities party to this case (City of Mount Vernon, Skagit County, and Skagit County Fire District No. 3) in order to accommodate response to emergencies affecting the health, safety, and welfare of the surrounding communities;

10 (4) BNSF must separately negotiate and enter into a private crossing agreement for limited continued use of the Hickox Road crossing with Western Valley Farms in order to accommodate the seasonal harvesting and related cross-highway transportation of its corn or other feed crops; and

11 (5) BNSF must continue to maintain and operate the safety features now in place at the Hickox Road crossing.

12 **Petitions for Review:** Western Valley Farms petitioned for review of the decision to close the crossing, arguing that it should remain open or that conditions should be modified; BNSF petitioned for removal of authorization for farm use and of conditions (4) and (5), above; Commission Staff, West Valley Farms, WSDOT and BNSF answered these petitions.¹

13 **Commission Decision:** The initial order is affirmed with modification, rejecting conditions (4) and (5) identified above, and with minor clarification.

II. BACKGROUND

14 This proceeding involves a petition by Burlington Northern Santa Fe Railroad to close a railway-highway crossing at-grade at Hickox Road, at the southern border of Mount Vernon, Washington. The request is occasioned by the extension by BNSF and

¹ Mount Vernon and Skagit County answered the BNSF petition for administrative review, understanding it to oppose use of the private crossing by city and county emergency vehicles and to state the view that the local governments would be expected to share in costs of crossing

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WSDOT of a siding at that location to allow upgrading of passenger train service between Seattle and Bellingham to operate at speeds over 100 miles per hour in a high-speed rail corridor using BNSF's single main-line track. The siding would lengthen to nearly two miles and extend past the Hickox Road crossing. It would create frequent, sometimes-extended crossing blockages, and trains stopped on the siding although not blocking the crossing could dangerously restrict lines of sight for motorists using the crossing. The Hickox Road crossing is relatively little-used (less than 400 vehicles per average day), and alternative crossings are relatively near (Blackburn Road is within 1.5 miles to the north and Stackpole Road within a mile to the south).

- 15 The Hickox Road crossing is in a rural area near the city limits of Mount Vernon, surrounded by open farm fields, barns, and some rural homes. To the east, both Interstate 5 (I-5) and Old Highway 99 run approximately parallel to the BNSF main line; to the west are the Skagit River and Dike Road. Active safety features at the Hickox Road crossing include flashing light signals, automatic gates and warning bells; passive safety features include a yellow highway-rail grade crossing advance warning sign and a white "crossbuck" highway-rail grade crossing sign on each side of the tracks.²
- 16 Stackpole Road, approximately one mile to the south, lies in a rural area outside of Mount Vernon's city limits. It is surrounded by open farm fields. BNSF's request to close the Hickox Road crossing pledges to upgrade the Stackpole Road crossing to include active safety features at the same level currently in use at Hickox Road.
- 17 The Blackburn Road crossing, approximately 1.5 miles to the north of Hickox Road, is entirely within Mount Vernon. It consists of two sets of tracks and is situated at the intersection of several roads. Active safety features there include cantilevered flashing light signals, automatic gates, warning bells, and traffic signals interconnected for preemption by the automatic railway gates. Numerous passive

reconfiguration. BNSF replied, clarifying that neither understanding was correct, although it did propose to review and discuss the need for warning devices at the private Hickox Road crossing.² The initial order contained exhaustive footnotes to exhibits and transcripts for the source of factual statements. For economy in presentation and as a matter of style we include such citations only where necessary to explain or complete the text of this Order. Persons seeking the exact record source of factual statements may refer to the initial order.

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safety features also protect this crossing: yellow advance warning signs and white "crossbuck" signs on each side of the tracks, supplemental traffic control signage indicating where drivers should stop when presented with a red traffic light and warning drivers not to stop on the tracks, as well as painted pavement markers in advance of the intersection.

18 The area west of the Hickox Road crossing, outside Mount Vernon, is generally within a designated floodplain subject to seasonal flooding, and is protected from the Skagit River by a raised dike system. The County's primary source of rock and gravel for flood fighting actions is located approximately 1.2 miles east of the Hickox Road crossing.

19 The area of Mount Vernon closest to the Hickox Road crossing is designated for commercial and limited industrial uses. It contains sparse residential and some commercial development.

III. THE PROPOSED SIDING AND ITS CONSEQUENCES

20 Completion of the proposed siding would result in a two-track crossing, with the road intersecting both a main line and a siding track. Such crossings create unique safety hazards, including the experience that some people, assuming that a train stopped on a siding is activating the signals, will attempt to drive around the lowered gates only to be hit by an oncoming train on the main line. It is possible to clear the crossing for auto traffic³, but "splitting" trains that are only waiting to continue their journey, not stopping or parking, involves difficulties. Switching may be needed that could affect main line track use; the split train could continue to activate signals, confusing motorists; and the process of splitting the train could add time to the train's use of the siding and interfere with traffic as well as delay the train.

21 A siding situated at a main line crossing poses dangers. If trains using the siding are within the range of activation sensors, active warning devices (flashing lights, bells, and gates) would effectively close the crossing for the full length of time needed for the trains to meet and pass. This includes the time for a train to enter the siding, slow

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to a stop, wait, and leave the siding. Freight trains are expected typically to pause on the siding for five to ten minutes to allow a passenger train to pass, but in some circumstances could remain parked, blocking the crossing up to several hours to allow another freight train to pass.

- 22 Freight trains parked on the Hickox Road siding would create a visibility hazard for cars and pedestrians east of the crossing, preventing a clear view of trains on the main line. Activation of the crossing's warning lights, bells and gates by a train that remained parked on the crossing but did not enter or block the crossing would cause confusion for drivers and pedestrians, tempting some to go around the lowered gates and across both sets of tracks. In addition, some drivers will ignore railway crossing safety signals and drive around lowered gates, even when "four-quadrant" gates (gates which also block lanes of opposing traffic) are installed.⁴
- 23 The average weekday traffic volume was 340 vehicles on Hickox Road based on 2006 data. If the crossing is closed, a study predicts that the majority of this traffic would be diverted to Stackpole Road,⁵ to the south, with only a single peak-hour trip diverting north to cross the tracks at Blackburn Road.⁶ WSDOT witness Mr. Norris stated that if all Hickox Road traffic were diverted to Blackburn Road, the additional traffic would not be detectable within the accuracy of traffic count equipment and safety at the Blackburn Road crossing would not be adversely affected.
- 24 Mr. Zeinz, the expert witness for Commission Staff, stated that installation of a four-quadrant gate system could mitigate the newly created hazards from the siding track, albeit at considerable expense.⁷ He acknowledged that four-quadrant gates are typically found only in high-speed rail corridors to temporarily "seal" crossings as passenger trains rush through, not at multiple track crossings with blocking issues

³ WAC 480-62-220(1) states that "railroad companies must not block a grade crossing for more than ten consecutive minutes, if reasonably possible."

⁴ Peterson, Exh. No. 92, 5:10 - 7:13; Peterson, TR. 614:14 - 619:24 (discussing ability of drivers to defeat protections offered by four quadrant gates by breaking gate arms or taking advantage of vehicle presence detection systems on "exit" gates).

⁵ G. Norris, Exh. No. 11, 16:15 - 17:3; *see also* G. Norris (rebuttal), Exh. No. 15, 2:13-14.

⁶ G. Norris (rebuttal), Exh. No. 15, 2:1-14. *See also* G. Norris, TR. 784:10 - 787:16.

⁷ "In part, it becomes a value judgment as to whether the potential advantages of retaining the crossing can justify such expense [upwards of \$400,000 to \$500,000], especially the fact that it will still be blocked and rendered unusable from time to time." Zeinz, Exh. No. 50, 8:14-18.

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from trains waiting on sidings. He recognized that drivers who are intent on defeating the added protections of four-quadrant gates could do so and that a "gate violator" could cause an extremely serious collision with an oncoming train. Mr. Zeinz stated:

[I]t's commonly accepted by all the people in my profession from railroads, from state highway departments, from regulatory agencies where I have had experience, if you have a situation where a crossing is going to be routinely blocked by a train, generally the best practice is not to have a crossing there at all, either try and close it or grade separate it or something.⁸

25 Nearly two dozen members of the public spoke against closure of the Hickox Road at-grade crossing at two public comment hearings in Mount Vernon. Their concerns ranged from impacts on agricultural transportation routes to impacts on emergency response services to matters of personal convenience for access to I-5. In addition, the Commission received numerous written comment letters as well as several petitions opposed to the closure.

IV. THE INITIAL ORDER

A. Closure.

26 The initial order ruled that the crossing should be closed. It found that adding the siding track will magnify the inherent potential dangers by obstructing motorists' vision as they approach the crossing and also cause confusion on the regular occasions when a train blocks the crossing for appreciable lengths of time. It also found that the addition of another set of tracks will pose another problem: A train waiting on the siding track nearest a driver may obstruct the view of oncoming train traffic on the main line, such that persons waiting at a gated crossing may only observe the train stopped on the siding, become impatient with the apparently unnecessary delay, drive around the gates, and be struck by an oncoming train. The initial order found that the dangerous situation presented by this case could not be fully mitigated by keeping the crossing open through use of four quadrant gates, and that after completion of the siding project, the Hickox Road crossing will become so unsafe and dangerous that it must be closed to further public travel.

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27 The initial order further found that after the safety upgrades pledged by BNSF for the Stackpole Road crossing are in place, Stackpole Road will be as safe as the Hickox Road grade crossing is in its present configuration. Blackburn Road, despite its complex intersection, will remain safe and will be safer than the reconfigured Hickox Road.

B. Private Crossing

28 The initial order found that emergency response needs require mitigation of the effect of closing the crossing and ordered conversion of Hickox Road from a public crossing into a private crossing for emergency response and for flood control and mitigation. It ordered upgrades to the safety features at Stackpole Road and turnaround provisions at the closed Hickox Road crossing.

29 The order also found that special considerations are necessary when closing a road that provides the most direct access to a long-established business that could be "financially landlocked" if existing access is eliminated.⁹ It noted that the Federal Railroad Administration specifically includes farm crossings within its listing of appropriate uses for private crossings and that another owner of nearby farmlands enjoys the benefit of a private crossing.

30 The order determined that Western Valley Farms' need for the Hickox Road crossing is greater than and distinct from all other local agricultural businesses operating in the area west of the crossing because Western Valley has become financially dependent on the existence of the Hickox Road crossing during the late summer harvest season. The order determined that closing the Hickox Road crossing would threaten the financial health of a long-established family farm business.¹⁰ The initial order would require BNSF to convert the public crossing into a gated private crossing, while maintaining the existing active signals, for seasonal use by Western Valley despite possible extended blockages requiring trucks to detour around the blocked crossing.

⁸ Zeinz, TR. 1195:3-10.

⁹ We note that a private crossing already exists north of Hickox Road for the benefit of David Christianson's business, which would otherwise be geographically landlocked. This order does not address the modifications, if any, that might become necessary to the existing private crossing agreement between BNSF and Mr. Christianson once the siding project is complete.

¹⁰ See D. Boon, Exh. No. 67, and J. Boon, Exh. No. 71.

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Finally, the order would require the farm and the railroad to provide each other with sufficient advance notice of their schedules to minimize disruptions to Western Valley and to allow BNSF (and Amtrak) to advise its engineers of farm equipment temporarily making use of the private crossing at Hickox Road.

V. PETITIONS FOR ADMINISTRATIVE REVIEW

31 The Commission received petitions for administrative review from Western Valley Farms and BNSF. In response, BNSF, Western Valley Farms, WSDOT, Commission Staff and the local jurisdictions answered one or both of the petitions.

I. Western Valley Farms

1. Closure of the Crossing

32 Western Valley challenges the initial order's decision to close the crossing. It argues first that the initial order fails to consider the unique role of Hickox Road as an agricultural transport corridor. It contends that the siding to be extended now crosses Blackburn Road and thus poses the same hazards cited for Hickox Road once the siding is extended. It also argues that closing the Hickox Road crossing would divert agricultural traffic to Blackburn Road – thus rendering it less safe than a reconfigured Hickox Road crossing that continued to carry agricultural traffic.

33 Western Valley's argument contains insufficient citation of facts to support its conclusions. While it argues that the existence of the siding at Blackburn Road will result in obstructed views of the main line track, Western Valley Farms does not cite to the record to support its contention. Rather, the expert testimony of record is that the Blackburn Road crossing has adequate capacity to absorb all of the Hickox Road traffic without creating difficulties. Even if the traffic study failed to consider the effects of harvest traffic (other farm traffic appears to be incidental), we find credible the expert testimony that Blackburn Road could absorb an average volume of 340 vehicles per day without affecting safety, that such volume would be insignificant within the accuracy of traffic counting devices and that very few drivers would choose the Blackburn Road crossing over the Stackpole Road crossing. Our conclusion from the credible evidence of record is that the Blackburn Road crossing can safely absorb the agricultural traffic in question.

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34 Here, the *transportation* needs can reasonably be met by existing alternative crossings, and enhancing safety protection at Stackpole Road. The travel will be farther than using the existing crossing, and consequently somewhat more expensive per trip. The additional travel is of a relatively slight distance, and somewhat less convenient, but is a route that is much safer and meets the public need for cross-track access.¹¹

35 The entire purpose of closing the crossing is to protect the public, including the farm operators, their drivers and employees, and railroad employees, passengers and shippers, from unnecessary risk of death, injury, and destruction of property at the crossing. The uncontradicted testimony of the safety experts is that the existing safety devices at the Hickox Road crossing are inadequate to provide that protection, and that even upgrades costing several hundred thousand dollars would not afford complete protection. We are unwilling to expose farmers, and their employees, the railroad and its employees, passengers, and shippers to an increased risk of death, injury, and destruction of property when reasonable transportation alternatives exist.

2. Federal Preemption

36 Western Valley argues that the initial order fails to resolve whether the federal Surface Transportation Board has exercised its jurisdiction under law with regard to the Hickox Road crossing, and challenges an apparent lack of an environmental impact statement under the National Environmental Protection Act, or NEPA.¹²

37 We reject these arguments. The appropriate place to challenge an alleged failure to assert federal jurisdiction is before the appropriate federal agency, not before a state agency lacking jurisdiction to address the issue. Further, the record indicates that the project has been reviewed under the Washington State Environmental Policy Act ("SEPA").

¹¹ While we have no reason to doubt the sincerity of the testimony regarding dire financial effects of crossing closure on the farm, it is a matter of opinion rather than a matter of fact. No evidence exists on this record of underlying facts or assumptions, nor of a complete financial picture of the farm. Therefore, we are in no position to evaluate it.

¹² WSDOT asserts in its Answer that the proponents of the project complied with NEPA as well as its Washington State counterpart, as disclosed in a Declaration filed in an earlier phase of the proceeding.

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3. Concern Regarding Negotiations

38 Western Valley also contests the initial order's proposal to allow harvest-period use of the Hickox Road crossing. Citing the initial order's proposal that the railroad and Western Valley negotiate terms for use of the crossing, Western Valley argues that it will be unable to determine whether to appeal the Commission order until the negotiations have been held and it determines whether the results of negotiation are favorable or unfavorable to its interests. Western Valley prefers the Commission make a final decision whether the crossing should be closed.

39 While our decision below to reject the proposal for harvest use may render this issue moot, we note that the Commission's retention of jurisdiction to effectuate the terms of a Commission order appears to provide an adequate remedy to review disagreements over implementation of an order. Western Valley acknowledges that the Commission, subject to judicial review, has statutory jurisdiction to decide whether crossings remain open or are closed.

B. BNSF Railway Company

1. Private crossing for harvest use

40 BNSF also petitions for administrative review. Its basic challenge is to the initial order's proposed requirement that a private crossing be established for farmers' harvest-period use. BNSF recognizes that the proposed order attempts to accommodate the parties' needs of record, but it challenges several aspects of the initial order's requirements and its supporting reasoning.

2. Financial Need

41 BNSF first argues that the initial order improperly assesses the need for a private harvest crossing. BNSF argues that the issue of financial damage, which the initial order cites as the controlling factor in requiring a private crossing, is beyond the scope of the Commission's inquiry.¹³ Commission Staff supports this view.

¹³ The initial order found that the costs of using alternative crossings would result in economic failure of Western Valley Farms. Initial Order, ¶ 87.

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42 We agree. The *Snohomish County* decision¹⁴ on which the initial order relies approves the principle that crossings may remain open only if the need for the crossing, *i.e.*, the public convenience and necessity for the crossing, outweighs any dangerous condition at the crossing. However, we do not have jurisdiction to consider the financial consequences of crossing closure when balancing need with risk. We only have jurisdiction to consider the effects of closing a crossing on transportation at the crossing. To the extent Western Valley believes itself financially damaged by a decision to close the crossing, it may pursue a judicial remedy.

3. Nature of Use

43 BNSF challenges expansion of the allowable use of a private crossing from occasional, as-needed use by emergency vehicles and rarely-necessary but critically-important flood-related activities, to include hundreds of crossings per day by commercial vehicles for a significant period every year. It argues that use several times per year for emergency access and use at intervals of several years for flood response are fundamentally different from the needs of farms during an annual harvest season.

44 We agree. The first difference is the volume of use. Emergency use is a relatively rare occurrence, likely numbering fewer than a dozen times per year. The proposed farm use of as many as several hundred crossings per day would amount to a *de facto* public crossing during a part of the year, even when access is through a gate with a lock.

45 BNSF argues that the purpose of the harvest traffic use is different from use for emergency vehicles, pointing out that the initial order finds the reconfigured crossing to be exceptionally dangerous. Emergencies requiring safety agency or flood response by their nature have a high degree of necessity that justifies the occasional risk in use of the crossing. The same cannot be said of use by routine harvest traffic in search of a slightly shorter, slightly less expensive route.

46 Finally, BNSF argues that the character of use, by heavy commercial vehicles, is by itself a more dangerous use than by individual passenger vehicles. It cites evidence of

¹⁴ *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 255, 212 P.2d 829 (1949).

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record that trucks and tractor-trailers are involved in more than three-quarters of private crossing injuries, nearly 70 percent of all collisions, and more than half of fatalities.¹⁵

47 We find each of these arguments persuasive. On the facts here, the proposed “private” use by farm vehicles at the crossing is traffic of a sort that is inconsistent with use of a limited-use private crossing.

4. Public need versus danger

48 BNSF argues that, when measured against use of the *reconfigured* crossing, the alternative crossings are manifestly more safe and arguably more convenient. The private crossing would be protected by a locked gate. Use of the crossing, BNSF points out, would require each driver, on each harvest-season trip, to stop the 3-axle or semi-trailer truck, leave the cab, unlock and open the gate, return to the truck, verify that the crossing is clear, proceed across the tracks, stop, return to the other side on foot to close and lock the gate, then recross the tracks on foot, and drive the truck away. In addition to the time involved, the process requires crossing the tracks three times, once in a vehicle, twice on foot. If the crossing is blocked by a train, the driver would have to wait until the crossing clears to cross the tracks, or drive to an alternate crossing. It is possible that a train could arrive while the driver is out of the vehicle on the other side of the tracks, leaving driver and vehicle separated for the duration of the blockage or tempting the driver to outrun the train to return to the vehicle. Farm witnesses testified that because of the uncertainty about crossing availability due to use of the siding, the farm might well choose not to use the Hickox Road crossing even if it remained open – uncertainties about access via Hickox Road would thus require farm traffic to use an alternative crossing anyway.¹⁶

49 We conclude that harvest-season value of the private crossing after construction of the siding would be greatly diminished, while the danger of the crossing is greatly increased. Given this equation, the degree of public need, including the affected farm’s transportation need, does not justify the risk in leaving the crossing open either as a public crossing or as a private crossing for harvest use.

¹⁵ Exh. No. 101, at 192.

¹⁶ See, J. Boon, TR. at 1111-1115.

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5. Retention of signals

- 50 The railroad also argues that retention of automatic signals and gates at a closed Hickox road crossing is inconsistent with a private crossing, is prohibitively expensive, and is unnecessary for limited private use.¹⁷
- 51 BNSF urges that the Commission allow a diagnostic team, including representatives of the railroad and local jurisdictions to determine required safety measures at the crossing. Commission Staff supports creation of a diagnostic team and asks to be designated as a member.
- 52 We accept BNSF's arguments and agree that it would be appropriate to engage a diagnostic team before authorizing a level of signalization at the crossing. A diagnostic team should be convened with representatives from BNSF, WSDOT, the local emergency service and flood control agencies, and Staff, to determine the need for and configuration of any required safety protections at the crossing. The parties must submit the team's report for Commission review and approval prior to opening the private crossing, as a condition of closing the crossing to public traffic.

6. Lack of schedule; interference with railroad operations

- 53 BNSF raises two other matters. First, it notes that unlike passenger trains, freight trains do not run on schedules¹⁸ It argues (and we accept) that it is inappropriate to require the railroad to provide train-operation schedule information to assist farmers in planning harvest movements. Even were that not the case, we also agree with BNSF and Staff that such a requirement would risk inappropriately entering into the sphere of federal jurisdiction over train operations.,

- 54 Second, BNSF objects to references in the initial order to the availability of private crossings for farm use and to the existence of a nearby private crossing for farm use. The objection is valid, and we disregard the references because there is no indication

¹⁷ Western Valley argues that its needs are of a different character from those of the general public, and that both the private crossing and retention of signals are needed for its convenience. We reject the private harvest crossing proposal because retaining signals at the crossing, even with additional devices, would be inadequate to protect public safety.

¹⁸ McIntyre, TR 679.

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in this record about the nature of use of the existing private crossing, the reasons for its existence, the nature of the agreement for its operation, or aspects of the law authorizing such crossings or any regulations there under, nor any information at all, that would render its mere existence relevant to a decision in this proceeding.¹⁹

C. Local Jurisdiction

55 The local jurisdictions (the City of Mount Vernon, Skagit County, and Skagit County Fire Protection District No. 3) all respond to proposed changes to the initial order that are contained in the BNSF petition. In reply, BNSF withdraws the relevant changes or explains them as not intending to alter prior understandings about proposed rights and responsibilities. On that basis we perceive that the interests of the local jurisdictions are satisfied and no further inquiry need be made.

FINDINGS OF FACT

56 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

- 57 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the placement and conditions of operation of at-grade crossings of railroad tracks with public roadways within Washington.
- 58 (2) The Hickox Road at-grade crossing is located at the southern edge of the city limits of Mount Vernon in Skagit County, Washington. On an average day, four Amtrak passenger trains, a dozen freight trains, and fewer than 400 vehicles make use of the crossing.

¹⁹ The initial order does not find that any Western Valley land is landlocked, *i.e.*, without lawful road access to public streets.

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- 59 (3) The Hickox Road crossing is within one mile of a crossing to the south (Stackpole Road) and one and one-half miles of a crossing to the north (Blackburn Road).
- 60 (4) At-grade crossings with more than one set of tracks are significantly more dangerous than at-grade crossings with only a single set of tracks. When a siding track creates the potential to obstruct a motorist's view of the main line track, the crossing becomes exceptionally hazardous.
- 61 (5) WSDOT is planning to extend a siding track south of Mount Vernon that would extend past the Hickox Road crossing to allow upgrading of passenger train service between Seattle and Bellingham to operate at speeds over 100 miles per hour in a high-speed rail corridor using BNSF's single main-line track. Extending the siding track will result in a multiple track crossing at Hickox Road.
- 62 (6) Closing the Hickox Road grade crossing will divert a majority of its current traffic to Stackpole Road, with the remainder diverted to Blackburn Road. Closure of the Hickox Road crossing will increase the travel time and distance required of some users of the existing crossing. The alternate crossings are both less than 1.5 miles from the Hickox Road crossing and both have the capacity to absorb the resulting traffic increase without adverse effect on crossing safety.
- 63 (7) The Skagit River poses regular threats of flooding to the areas surrounding the Hickox Road crossing, requiring continued access to the crossing by local governmental agencies in order to maintain their abilities to fight the rising river and permit the public to use an alternate emergency evacuation route when necessary. The Hickox Road crossing is critically located and its continued use is crucial for responding to flood emergencies.
- 64 (8) Closing the Hickox Road crossing will detrimentally impact response times for critical emergencies by Skagit County Fire District No. 3 to areas located west of the Hickox Road crossing.

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- 65 (9) Constructing the siding at Hickox Road will adversely affect harvest traffic for Western Valley Farms. Because the siding would block the crossing at times not easily predictable, resulting in waiting time or rerouting of traffic, the farm would find a reconfigured but open Hickox road crossing much less convenient than the current crossing.
- 66 (10) Closing the Hickox Road crossing will result in additional time and distance for harvest traffic of Western Valley Farms. Post-closure travel routes will increase necessary distances by up to approximately three miles. The increase in distance for seasonal traffic and the resulting increase in travel time do not constitute an undue barrier to the orderly flow of automotive traffic across the tracks.
- 67 (11) The Stackpole Road and Blackburn Road crossings individually, or together, provide the public with suitable alternative access across the tracks with a minimum of inconvenience. Under normal conditions, traffic diverted from Hickox Road can conveniently use the Stackpole Road crossing to the south or the Blackburn Road crossing to the north.
- 68 (12) Closing the Hickox Road crossing will result in inconvenience to some persons who now use the crossing. Mitigating measures, such as upgrading the safety features at the Stackpole Road at-grade crossing, creating a turnaround cul-de-sac on the approach to the railroad tracks on Hickox Road, and improving the intersection radii at Stackpole Road and Dike Road, can ameliorate concerns about closing of the Hickox Road crossing.

CONCLUSIONS OF LAW

69 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

- 70 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding.

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- 71 (2) The Hickox Road at-grade crossing in Mount Vernon, Skagit County, Washington, is inherently dangerous. WSDOT's addition of a second set of tracks to this crossing magnifies the danger presented to vehicle traffic, creating an exceptionally hazardous crossing upon completion of the siding extension project.
- 72 (3) The public convenience and necessity do not require that the Hickox Road crossing remain open. The Commission should grant BNSF's petition and order that the Hickox Road at-grade crossing in Mount Vernon be closed to the public, upon conditions that will mitigate the inconvenience of closure.
- 73 (4) The risk of flooding from the Skagit River and maintaining access for emergency fire and medical vehicles is necessary to protect public health, safety and welfare and warrants creating a private crossing at Hickox Road to benefit local governmental agencies.
- 74 (5) The relatively modest inconvenience to Western Valley Farms' seasonal harvest traffic does not demonstrate public convenience and necessity sufficient to require maintaining a public crossing or creating a private crossing at Hickox Road for the farm's harvest use and is unnecessary in light of available alternatives.
- 75 (6) The financial impact on Western Valley Farms of closing of the Hickox Road crossing is not a matter that the Commission may consider in determining public convenience and necessity for the crossing.
- 76 (7) The Hickox Road at-grade crossing should be closed to the public, subject only to emergency use for flood prevention and control and for emergency services, as provided in this Order.

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ORDER

THE COMMISSION ORDERS:

- 77 (1) The Commission grants the petition of Burlington Northern Santa Fe Railway to close the Hickox Road at-grade crossing to public use, subject to the following conditions, which must be met prior to closure:
- 78 (a) BNSF must upgrade the safety features at the Stackpole Road at-grade crossing to include active warning devices equivalent to those now in place at Hickox Road (flashing light signals, automatic gates, and warning bells);
- 79 (b) BNSF must work with the City of Mount Vernon and Skagit County to construct a turnaround cul-de-sac on the approach to the railroad tracks on Hickox Road and to alter intersection turning radii at Stackpole Road and Dike Road; and
- 80 (c) BNSF must enter into negotiations with the City of Mount Vernon, Skagit County, and Skagit County Fire Protection District No. 3 to draft a private crossing agreement that ensures continued access across the tracks for local emergency response to flood-related events, as well as incidents where the health, safety, and welfare of local residents would be affected. BNSF shall submit this agreement to the Commission no later than 75 days after entry of this Final Order or such further time as authorized by letter from the Secretary of the Commission.
- 81 (2) To ensure adequate safety at the private crossing, BNSF shall convene a diagnostic team to review the safety features of the private Hickox Road at-grade crossing. Team members shall include representatives of the railroad, the public safety and flood control jurisdictions, and Commission Staff. The diagnostic team shall propose necessary safety measures to the Commission for approval no later than 75 days after entry of this Final Order or such further time as authorized by letter from the Secretary of the Commission.

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- 82 (3) The Commission retains jurisdiction over the subject matter of and the parties to the proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective November __, 2008

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, 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 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

[Service Date January 14, 2009]

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

BNSF RAILWAY COMPANY,	) DOCKET TR-070696
)
Petitioner,	) ORDER 07
)
v.	) ORDER ON RECONSIDERATION,
	) GRANTING IN PART AND
CITY OF MOUNT VERNON,	) DENYING IN PART
	) RECONSIDERATION OF ORDER
Respondent.	) GRANTING PETITION TO CLOSE
	) HICKOX ROAD GRADE
	) CROSSING SUBJECT TO
	) CONDITIONS
.....)

Synopsis. The Commission denies Western Valley Farms' petition for reconsideration of the final order closing the crossing of Burlington Northern Santa Fe tracks at Hickox Road in Skagit County, Washington. This Order rejects Western Valley's claim of violations of the State Environmental Policy Law (SEPA) and its contentions that it should be allowed to participate, in addition to local governments, in establishing a private crossing agreement and to join a post-order review panel authorized to recommend changes to the crossing configuration. The Commission denies Western Valley's challenges to findings of fact and conclusions of law in the final order, but modifies the final order to require cul de sacs on both road approaches to the crossing unless a diagnostic team recommends, and the Commission agrees, that a second cul de sac is unnecessary.

I. INTRODUCTION

Procedural History. Burlington Northern Santa Fe Railway Company (BNSF or Burlington Northern) filed a petition on April 11, 2007, with the Washington Utilities and Transportation Commission (Commission) to abandon and close to public use a railroad-highway grade crossing located at Hickox Road, Mount Vernon, Skagit

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County, Washington in accordance with RCW 81.53.060. The railroad seeks to close the crossing to address safety hazards associated with extension of a siding alongside main line tracks at the location of the crossing.

3 After conducting evidentiary hearings and reviewing post-hearing briefs submitted by the parties, Administrative Law Judge Adam E. Torem entered an initial order, Order 05, requiring the closure of the Hickox Road crossing to the public, but allowing limited emergency use of the crossing by local jurisdictions for public safety uses, including medical, police, and emergency services, including flood evacuation and control. The initial order also required the railroad to negotiate and enter into a private crossing agreement with Western Valley Farms, LLC (Western Valley Farms or Western Valley), a business operating a large dairy near the crossing, for limited continued use of the crossing for seasonal harvesting and transportation of its corn or other feed crops.

4 Western Valley Farms requested the Commission reverse the initial order's decision to close the crossing, arguing that it should remain open or that conditions should be modified: BNSF sought review of the order to remove the condition authorizing farm use and other conditions. Commission Staff, West Valley Farms, the Washington State Department of Transportation (WSDOT) and BNSF answered these petitions.

5 In the Final Order, Order 06, entered on November 4, 2008, the Commission affirmed the initial order, in part, but rejected arguments by Western Valley Farms that the crossing should remain open or that it should be allowed to use the crossing as a private crossing during harvest season.

6 Western Valley petitioned for reconsideration on November 14, 2008, raising several issues. The Commission called for answers on November 19, 2008, and indicated its intention to enter an order on reconsideration no later than January 16, 2009. BNSF, WSDOT, and Commission Staff answered the petition.

7 On reconsideration, the Commission denies the petition in part, and grants it in part.

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8 **Appearances.** Bradley Scarp and Kelsey Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represent BNSF. Kevin Rogerson, City Attorney, Mount Vernon, Washington, represents the City of Mount Vernon (Mount Vernon or the City). Stephen Fallquist, Civil Deputy Prosecuting Attorney, Mount Vernon, Washington, represents Skagit County (County). Scott Lockwood, Assistant Attorney General, Olympia, Washington, represents the Freight Systems Division of the WSDOT, Tumwater, Washington. Thomas Burke, Burke Law Offices Inc., P.S., and Brian Snure, Snure Law Office, PSC, both of Des Moines, Washington, represent Skagit County Fire Protection District No. 3 (Fire District No. 3), Conway, Washington. Gary T. Jones, Jones & Smith, Mount Vernon, Washington, represents David Boon, Yvonne Boon, and Western Valley (collectively "Western Valley Farms" or "Western Valley"). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Staff).¹

II. MEMORANDUM

A. Compliance with SEPA

9 Western Valley challenges the Commission's compliance with the State Environmental Policy Act (SEPA), arguing that this agency violated its responsibility to conduct its own environmental review. The parties argued this issue and the administrative law judge resolved it in Order 03, finding that SEPA requires a single agency to act as lead agency for SEPA review purposes, and that, as project sponsor, WSDOT holds that responsibility. The order recites WSDOT's commitment to issue a new SEPA determination. A procedural order entered during a proceeding is reviewable following entry of the final order unless the Commission grants interlocutory review under WAC 480-07-810. No party sought interlocutory review of the order.

¹ In formal proceedings such as this, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an "ex parte wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including regulatory Staff. *RCW 34.05.455*.

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10 Western Valley cites a prior Commission order in *BNSF v. Skagit County*, Docket TR-940282, in which the Commission was responsible for SEPA compliance. There, the project involved the closure of several crossings, and no other construction project (except to implement closure) was proposed. Therefore, no other agency was involved and the Commission was the lead agency. Here, in contrast, WSDOT is sponsor of a project creating a siding track, which in turn requires other governmental action including this proceeding. As WSDOT points out in its answer, WSDOT is therefore required under WAC 197-11-050 to be the only agency responsible for SEPA compliance, to the exclusion of the Commission. Any review of WSDOT's SEPA process related to the crossing must be made pursuant to WSDOT procedural rules and applicable statutes. As we lack authority and jurisdiction to address Western Valley's claim, we deny the petition for reconsideration on this issue.

B. Participation in the Private Crossing Agreement.

11 The Commission's Final Order conditions closure of the Hickox Road grade crossing on the requirement that BNSF negotiate with the City, County and Fire Protection District to draft a private crossing agreement "that ensures continued access across the tracks for local emergency response to flood-related events, as well as incidents where the health, safety, and welfare of local residents would be affected."²

12 Western Valley contends that the Order erred in failing to include it as a party to the private crossing agreement because the farm may need to evacuate its animals and machinery over the Hickox Road crossing in the event of a flood. Western Valley argues that failure to provide for the protection and evacuation of farm animals will result in their proceeding to the higher ground of the railroad tracks, causing death of animals and rail accidents.

13 We find no error. BNSF points in its answer to the testimony of Mount Vernon's mayor³ reflecting legal requirements that the local emergency protection agencies, including those responsible for flood response, are charged with comprehensive planning, including to protect life and property of affected citizens during emergencies. Those agencies engage in exhaustive planning involving multiple tasks,

² Final Order, ¶ 80.

³ Norris, Exh. No. 28, at 3-4.

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including transportation needs that would include use of the private crossing.⁴ The term "local emergency response to flood-related events," in the Final Order includes the evacuation of livestock and other property in addition to people to the extent that emergency agencies deem that to be an appropriate priority for this crossing during a flood emergency.

- 14 The local agencies, not the Commission, have the responsibility to determine emergency response priorities and to conform available resources with priority needs. Western Valley's rights, just as those of every other similarly situated entity, are protected through the participation of local emergency agencies in the post-decision process and in those agencies' other programs affecting potential crossing use. It is both unnecessary and inappropriate to include Western Valley in the direct management of the crossing.

C. Asserted factual errors.

- 15 Western Valley challenges the Final Order's Finding of Fact No. 15 relating to the location of the crossing and asserts failure to find other facts.
- 16 First, it asserts that the finding should state that the crossing is within the city limits of Mount Vernon rather than "near" those city limits, as the finding is phrased.
- 17 We reject Petitioner's challenge. The first order in this proceeding, Order 01, resulted in revision of the caption to recognize Mount Vernon's jurisdiction at the location of the crossing pursuant to RCW 81.53.060. The phrasing of the finding is accurate: It could have no effect on jurisdiction in any event, and the proposed correction is therefore immaterial.
- 18 Second, Western Valley argues that the Final Order errs by failing to make a finding of fact that the nearest alternative (remaining) crossings are 2.5 miles apart, arguing that the distance deprives traffic from the western side of the track of direct access to a highway interchange. We reject this contention. The Order finds in paragraph 16 that the Stackpole Road crossing is about one mile south of the Hickox Road crossing, and finds in paragraph 17 that the Blackburn Road crossing is about 1.5

⁴ Brautaset, Exh. No. 23, at 3-6.

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miles to the north. Simple mathematics indicates that the two are about 2.5 miles apart.

- 19 Western Valley also argues that the Final Order's failure to enter findings that emphasize the utility of Hickox Road for freeway access constitutes error. We disagree. The locations of the respective roads and freeways are clear in the record, as are traffic counts and vehicle use information. No change is required to the Final Order.

D. Description of potential crossing use.

- 20 Western Valley objects to a description of crossing use contained at paragraph 48 of the Final Order, which sets out the process for unlocking private crossing gates, traversing the crossing, and then relocking the gates to prevent public use. It contends that the proposed scenario is unsupported by evidence and that a flag person would be employed at times of heavy use to minimize stops and delays.
- 21 The existence of a private crossing described in the record involves a mechanism to bar public use because the crossing has been found unsafe for public use. Chains and locks are described in the record as mechanisms for barring such use. The steps described in the Order to unlock and relock crossing gates is a reasonable and fair description of that process rooted in the record evidence. The fact that other options, such as the possible use of a flagger in some circumstances, might be available is not reflected in any record evidence. Further, it requires speculation about when a flagger would be required, the adequacy of flagging to assure safety in various possible scenarios, and other possible issues not addressed in the record.
- 22 We find no error in the factual basis for the challenged description of the crossing process. Nor is there any error in declining to address the hypothetical use of a flagger raised for the first time here.

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E. Inclusion of Western Valley Farms in post-order diagnostic team.

- 23 The Final Order authorized a diagnostic team effort to review appropriate crossing signalization, protection, and use protocols, and to make recommendations to the Commission for applicable terms. The Order required team representation by the railroad, WSDOT, Skagit County, the City of Mount Vernon, and the Commission Staff.
- 24 Western Valley objects to the Order's failure to include it as a member of the diagnostic team. It argues that its position as a potential significant user of the crossing and as a business with large investments in real and personal property, including livestock subject to evacuation in the event of flooding, give it a special entitlement to participate in developing terms for use of a private crossing.
- 25 The same factors applicable to Western Valley's proposed participation in the private crossing agreement, discussed above, apply here. In addition, the diagnostic team is not composed of crossing users with many potential needs, it is composed of agencies and the railroad, all with expertise in professional fields related to crossing configuration to meet the public needs. Western Valley has demonstrated no such expertise. The interests that Western Valley identifies are within the jurisdiction of the public agencies that are directed to participate in the diagnostic team. The Final Order did not err in excluding Western Valley.

F. Cul de sac placement and funding.

- 26 The Final Order accepts the requirement proposed in the Initial Order that BNSF provide funding only for a cul de sac on the eastern approach to the Hickox Road crossing, but not the western approach. Western Valley argues that the Final Order errs in failing to require a cul de sac on both approaches because the distance from the track to the nearest parallel road is long, and a cul de sac is needed for traffic that erroneously enters the road. Staff also suggests that we modify the Initial Order to require funding for cul de sacs on both sides of the crossing, consistent with a joint BNSF-WSDOT concession.

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27 BNSF suggests that the Final Order stand, subject to a review of crossing needs by the diagnostic team. We note that the earlier agreement to provide funding did not involve a review of public need, and we believe it is appropriate to consider evaluations of need when weighing requirements for substantial public investment. Relevant need factors would involve not only the frequency of likely mistaken entry, but also potential needs for turn-around during flood or other emergencies.

28 Consequently, we modify the Final Order to require a cul de sac on both the eastern and western road approaches to the private crossing, unless the diagnostic team determines and the Commission agrees that the second cul de sac is unnecessary.

G. Conclusion.

29 We grant Western Valley's petition for reconsideration in part and modify the Final Order to address the need for cul de sacs on both road approaches. In all other respects, the petition for reconsideration is denied.

ORDER

THE COMMISSION ORDERS:

- 30 (1) Western Valley Farms, LLC's petition for reconsideration is granted, and Order 06 is modified, to require cul de sacs on both approaches to the private Hickox Road crossing, and Burlington Northern Santa Fe Railroad and State Department of Transportation funding of both cul de sacs, unless the diagnostic team established in Order 06 recommends, and the Commission agrees, that a cul de sac is unnecessary for the western approach.
- 31 (2) Western Valley Farms, LLC's petition for reconsideration, in all other respects, is denied.

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- 32 (3) The Commission retains jurisdiction over the subject matter of and the parties to the proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective January 14, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

[Service Date February 27, 2009]

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

BNSF RAILWAY COMPANY,	)	DOCKET TR-070696
)	
Petitioner,	)	ORDER 08
)	
v.)	
	)	ORDER REQUIRING
CITY OF MOUNT VERNON,	)	CONSTRUCTION OF CUL-DE-
	)	SAC ON EASTERN APPROACH
Respondent.	)	TO HICKOX ROAD
)	
.....)	

1 *Synopsis: In this Order, we resolve the remaining dispute between the participants on the diagnostic team and require Burlington Northern Santa Fe Railroad (BNSF) and the Washington State Department of Transportation (WSDOT) to construct a cul-de-sac on the eastern side of the private crossing at Hickox Road. This Order also approves all other recommendations of the diagnostic team for safety measures at the Hickox Road crossing and road approaches and at the Stackpole Road crossing and road approaches.*

2 **Nature of the Proceeding.** This proceeding involves a petition by BNSF to close a railway-highway crossing at-grade at Hickox Road, at the southern border of Mount Vernon, Washington. The request is occasioned by the extension by BNSF and the WSDOT of a siding at that location to allow upgrading of passenger train service between Seattle and Bellingham to operate at speeds over 100 miles per hour in a high-speed passenger rail corridor using BNSF's single main-line track.

3 **Procedural History.** The Washington Utilities and Transportation Commission (Commission) granted BNSF's petition, but required the railroad to negotiate a private crossing agreement with the City of Mount Vernon (the City), Skagit County (the County) and Skagit County Fire Protection District No. 3 (Fire District) to allow continued access across the tracks for local emergency response to flood-related

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events and other incidents.¹ We conditioned closure of the crossing on formation of a diagnostic team “to determine the need for and configuration of any required safety precautions at the crossing.”² We required that the diagnostic team submit a report for review and approval prior to opening the private crossing.³ Finally, we required BNSF to work with the City and County to construct a turnaround cul-de-sac on the approach to the tracks at Hickox Road.⁴

4 Western Valley Farms, LLC (Western Valley Farms or Western Valley), a business operating a large dairy near the crossing, requested that we reconsider our Final Order, asking among other items, that we require BNSF and WSDOT to construct cul-de-sacs on both road approaches to the Hickox Road crossing. The Commission Staff joined in Western Valley’s request for two cul-de-sacs.

5 We denied Western Valley’s petition for reconsideration, for the most part, but granted the request to require cul-de-sacs on both approaches, finding there is a potential need for vehicles to turn around during flood and other emergencies and that the likelihood exists that drivers may mistakenly approach the closed crossing. We required construction of cul-de-sacs on both the eastern and western approaches to the private crossing “unless the diagnostic team determines and the Commission agrees that the second cul-de-sac is unnecessary.”⁵

6 **Diagnostic Team Report.** On February 9, 2009, the diagnostic team filed a letter with the Commission proposing certain safety measures at the Hickox Road and Stackpole Road crossings, enclosing a copy of the draft private crossing agreement. The team recommends that BNSF upgrade at its own expense the safety features at

¹ *BNSF Railway Company v. City of Mount Vernon*, Final Order on Review, Granting Administrative Review; Modifying Initial Order Granting Petition to Close Hickox Road Grade Crossing Subject to Conditions, Order 06, Docket TR-070696 ¶¶ 77, 80 (Nov. 4, 2008). The procedural history of this matter is set forth in detail in the Final Order and will not be repeated here.

² *Id.*, ¶ 52.

³ *Id.*, ¶¶ 52, 81.

⁴ *Id.*, ¶ 79.

⁵ *BNSF Railway Company v. City of Mount Vernon*, Order On Reconsideration, Granting in Part and Denying in Part Reconsideration of Order Granting Petition to Close Hickox Road Grade Crossing Subject to Conditions, Order 07, Docket TR-070696 ¶¶ 27-28 (Jan. 14, 2009). As a result of our order, a diagnostic team was formed to negotiate the private crossing agreement and resolve other related issues.

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ORDER 08

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the Stackpole Road crossing to include active warning devices like those now at the Hickox Road crossing and to alter the turning radii at the intersection of Stackpole and Dike Roads. The team further recommends that BNSF install gates at its expense wide enough to allow emergency-response use on each side of the crossing. The gates will be open only for emergency-use by public safety and flood control jurisdictions, as provided in the private crossing agreement. Existing warning devices at the crossing will be removed and replaced with private crossing signs once the gates are installed.

7 The letter also notifies the Commission that the team could not reach consensus on whether to construct a cul-de-sac on the eastern approach to the crossing. BNSF and WSDOT assert that a cul-de-sac on the eastern approach is unnecessary, in part, because of development of adjacent property that may allow sufficient room for vehicles to turn around. They ask additional time to consider both the need for and an alternative design for the east side of the crossing.

8 The City, County and Fire District oppose the railroad's and WSDOT's request. They argue that any developer of property east of the crossing will not be required to build a cul-de-sac to provide adequate turnaround for large emergency and commercial vehicles, and will be required to widen Hickox Road only to the proposed driveway location – a significant distance east of the crossing. The City, County and Fire District ask that we enforce the provisions of Order 07 and require construction of cul-de-sacs on both the east and west sides of the private crossing.

9 **Commission Decision.** First, we approve the recommendations of the diagnostic team for safety measures at the Hickox Road and Stackpole Road crossings. The railroad, WSDOT, Staff, City, County, and Fire District agree on all but one recommended measure. A review of the recommendations indicates that the parties and team members have considered the safety implications of closing the Hickox Road crossing to the public and the need for improvements to the public roadways. The recommendations are reasonable and should meet the statutory goal of ensuring the safety of the crossings.

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ORDER 08

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10 Second, we address the remaining dispute. In Order 07, we ordered the railroad and BNSF to build the second cul-de-sac unless the diagnostic team *and the Commission* found it unnecessary. As the team members can not agree whether the second cul-de-sac is necessary, we must make the determination. We find the City, County and Fire District's arguments persuasive that a cul-de-sac on the east side of Hickox Road is necessary. As the governmental body responsible for planning and issuing permits to developers, we defer to the City's judgment whether a potential developer would be required to improve the road or build a cul-de-sac: The City does not believe a developer would be required to do so. Further, delaying a decision to allow further negotiation up to the time of construction is neither practical nor protective of public safety. This proceeding has been lengthy, and it is not likely that the parties will quickly reach a consensus on whether to build the second cul-de-sac. The construction season will soon begin, and our resolution of this remaining issue should allow the railroad and WSDOT to finalize engineering and construction plans. Thus, we require BNSF and WSDOT to construct a cul-de-sac on the east side of the private crossing at Hickox Road.

ORDER

THE COMMISSION ORDERS:

- 11 (1) The recommendations of the diagnostic team for safety measures to be implemented at the Hickox Road and Stackpole Road crossings before the Hickox Road crossing is closed for public use are approved.
- 12 (2) Burlington Northern Santa Fe Railway and the Washington State Department of Transportation must construct a cul-de-sac on the eastern side of the private crossing at Hickox Road.
- 13 (3) The Commission retains jurisdiction over the subject matter of and the parties to the proceeding to effectuate the terms of this Order.

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Dated at Olympia, Washington, and effective February 27, 2009

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

[Service Date October 21, 2009]

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

BNSF RAILWAY COMPANY,	)	DOCKET TR-090121
)	
Petitioner,)	
	)	ORDER 03
v.)	
)	
SNOHOMISH COUNTY,	)	INITIAL ORDER GRANTING
	)	PETITION TO CLOSE LOGEN
Respondent.	)	ROAD GRADE CROSSING
	)	SUBJECT TO CONDITIONS
.....)	

Synopsis: This is an Administrative Law Judge's Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. This Order recommends granting a petition by Burlington Northern Santa Fe Railway Company to close the Logen Road at-grade railroad crossing in Snohomish County, subject to conditions. One condition requires road and safety upgrades at both alternate crossings: the 300th Street NW at-grade railroad crossing, located approximately one-half mile to the north of the existing Logen Road crossing, and the 271st Street NW at-grade railroad crossing located approximately one mile to the south, in downtown Stanwood. A second condition requires BNSF to fund necessary road alterations and improvements associated with closure of the Logen Road crossing.

I. INTRODUCTION

1 **NATURE OF PROCEEDING.** Docket TR-090121 involves a petition by Burlington Northern Santa Fe Railway Company (BNSF or Burlington Northern) to close a railroad-highway grade crossing located at Logen Road, nearby to Stanwood, Snohomish County, Washington (US DOT #084713P) in accordance with Revised Code of Washington (RCW) 81.53.060.

2 **Appearances.** Bradley Scarp and Kelsey Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represent Burlington Northern. Justin W. Kasting and Matthew A. Otten, Civil Division Prosecuting Attorneys, Everett, Washington,

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represent Snohomish County (County). Lynn F. Logen, *pro se*, Bellevue, Washington, represents himself and the interests of his family (Logen). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).¹

3 **Procedural History.** BNSF initially filed its current petition to close the Logen Road at-grade railroad crossing in Snohomish County on January 22, 2009, and the Commission set the matter for hearing.² At a prehearing conference held on February 13, 2009, Administrative Law Judge (ALJ or Judge) Adam E. Torem ruled on petitions for intervention, confirmed the scope of issues to be presented at hearing, and set a procedural schedule for the docket.³

4 The Commission conducted an evidentiary hearing before Judge Torem upon due and proper notice to all interested parties on March 30, 2009, in Stanwood, Washington.⁴ The parties submitted 28 exhibits, 21 of which were admitted to the record during the course of the evidentiary hearing.⁵

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while an administrative law judge (ALJ) and/or the Commissioners make the decision. To assure fairness, the Commissioners, the presiding ALJ, and the Commissioners' accounting and policy advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See RCW 34.05.455.*

² BNSF previously petitioned to close this same crossing in September 1996. However, citing changed circumstances in May 2000, BNSF sought to withdraw its petition. The Commission granted the railway's request and dismissed the petition in June 2000. *See Docket TR-961212.*

³ *See* Order 01 (February 19, 2009); *see also* Transcript (TR.) Vol. I. Although Respondent Snohomish County filed a Waiver of Hearing on January 27, 2009 (*see* Exh. No. 2), RCW 81.53.060 required that the Commission hold a hearing on the petition because of objections timely received during the statutory public notice period.

⁴ On March 18, 2009, Mr. Logen sought a continuance of the hearing in order to allow additional time for hearing preparation and to explore the possibility of a settlement. Following a telephonic conference on March 20, 2009, where all parties were heard, Judge Torem denied the continuance request but required BNSF to expedite its discovery responses. *See* Order 02 (March 20, 2009) and TR. Vol. II.

⁵ In compliance with Judge Torem's requests at hearing, two additional exhibits were submitted after the close of the evidentiary hearing. On April 2, 2009, BNSF submitted copies of two separate local mutual aid agreements between local first responders; these were marked as

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5 The Commission held a public comment hearing on the evening of March 30, 2009, immediately after the close of the evidentiary hearing. Judge Torem conducted the public hearing in Stanwood. In addition, the Commission accepted written and electronic public comment on the matter from the date of BNSF's initial filing, January 22, 2009, through April 3, 2009.⁶ In sum, the Commission received and considered comments from several dozen persons, the majority opposing closure of the Logen Road crossing unless failure to do so would prevent the City of Stanwood from obtaining its proposed new rail station.

6 On May 8, 2009, the parties submitted their post-hearing briefs. On May 12, 2009, BNSF filed a Request to File Supplemental Brief offering additional legal analysis on an issue raised in Mr. Logen's post-hearing brief. On May 13, 2009, Mr. Logen filed his Opposition to BNSF's Request. On May 14, 2009, the Commission issued a notice declining supplemental briefing, effectively closing the evidentiary record in this matter regarding public safety and related closure issues as of that date.

7 *Environmental Review.* At hearing, the parties agreed that the Commission should not fully close the evidentiary record in this docket until completion of the environmental review process required under the State Environmental Policy Act (SEPA).⁷ On July 21, 2009, the Washington State Department of Transportation (WSDOT) issued its final SEPA Determination of Non-Significance (DNS).⁸ On

Exhibit 29 and admitted to the record. On August 26, 2009, BNSF submitted the final environmental review documents regarding the project (*see* paragraph 7, *supra*); these were marked as Exhibit 30 and admitted to the record. All parties were afforded an opportunity to comment on the final environmental review documents (*see* paragraph 8, *supra*).

⁶ The Commission accepted and considered several other comments received in October and November 2008, prior to the filing of BNSF's petition. It appears that these comments were submitted in response to a community information meeting conducted on October 30, 2008, in Stanwood, by BNSF, the Washington State Department of Transportation (WSDOT), the City of Stanwood, Snohomish County, and staff from the Commission's public involvement division.

⁷ TR. Vol. IV, 302:22 - 305:16 (March 30, 2009); *see also* TR. Vol. III, 76:6 - 80:21 (March 24, 2009). In July 2009, BNSF confirmed that WSDOT would assume the SEPA lead agency role and submit the required documentation to the Department of Ecology on or about July 20, 2009. *See* BNSF Response to Bench Request.

⁸ *See* Exh. No. 30.

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August 4, 2009, the 14 day comment period for the DNS expired. On August 26, 2009, WSDOT prepared and later published a Notice of Action identifying September 29, 2009, as the deadline to challenge the DNS. No challenge was filed.

8 On August 31, 2009, Judge Torem allowed the parties an opportunity to file comments on the relevance of the SEPA determination to this case. On September 11, 2009, Commission Staff and Mr. Logen both filed correspondence commenting on the DNS. On September 18, 2009, BNSF filed responsive comments on the SEPA process and resulting DNS.

9 On September 21, 2009, Judge Torem closed the evidentiary record in this docket.

10 **Initial Order:** The presiding Administrative Law Judge proposes that the Commission grant Burlington Northern's petition to close the Logen Road at-grade railroad crossing in Snohomish County to public-use, but only subject to the conditions that (1a) BNSF upgrade the 300th Street NW at-grade crossing with road safety measures identified by Snohomish County and designed to address expected increases in traffic; (1b) BNSF install updated active warning devices and signage at the 271st Street NW at-grade crossing and also provide proportionate funding for pedestrian safety improvements (i.e., sidewalks) as directed by a diagnostic team; and (2) BNSF provide funding for necessary road alterations and improvements associated with the closure of the Logen Road crossing (e.g., barrier on the west and cul-de-sac on the east). The presiding Administrative Law Judge does not condition this order closing the crossing on BNSF entering into a private crossing agreement with Lynn Logen or any other party or interested person.

II. BACKGROUND

11 Snohomish County is located in the northwest portion of Washington State, immediately north of King County. The City of Everett, with a population of over 100,000, is its largest municipality and serves as the county seat. The City of Stanwood, located about 25 miles northwest of Everett, has a population of approximately 5,000.

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- 12 Burlington Northern runs a main line track, as well as various side tracks, north and south through Snohomish County and the City of Stanwood. There are several roads running east and west that cross the BNSF line as it runs northbound from Stanwood and into the county's unincorporated area. As pertinent to this matter, these roadways include 271st Street NW, Logen Road, and 300th Street NW (also known as Dettling Road).⁹
- 13 WSDOT's Amtrak division is constructing a new train station in Stanwood. As part of this project to expand existing passenger train service in this corridor, WSDOT is extending the existing BNSF siding above Stanwood from its present length of 6,800 feet to over 10,000 feet, enabling longer freight trains to meet and pass along BNSF's main line.¹⁰ The lengthened siding will add a second set of tracks to the existing grade crossing at Logen Road as well as the two grade crossings located immediately to the north.¹¹ Therefore, citing the interests of safety and improved operations for both freight and passenger trains, BNSF seeks permission to close only the Logen Road grade crossing.¹²
- 14 The Logen Road grade crossing is located along a curved portion of track in a rural area north of Stanwood characterized by trees, agricultural use and some rural homes.¹³ Quite nearby to the west (where the roadway is also known as 292nd Street NW), Logen Road connects with the Old Pacific Highway; to the southeast, Logen

⁹ See Exh. Nos. 1, 16, and 17 (the latter two exhibits consist of photographs that provide a generalized overview of the relevant area and individual depictions of each grade crossing). Also peripherally relevant is the at-grade crossing near the intersection of 102nd Street and Pacific Highway, located another half-mile north of the 300th Street NW at-grade crossing.

¹⁰ Wagner, TR. Vol. IV, 10:25 - 15:15; *see also* Exh. No. 4 and Exh. No. 5.

¹¹ *Id.*, at 16:5-7 (second set of tracks at Logen Road) and Hunter, TR. 244:19 - 245:8 (second set of tracks at 300th Street NW and 102nd Street).

¹² Exh. No. 1, Petition for the Closure of a Highway-Rail Grade Crossing (January 22, 2009), Section 5, ¶ 1.

¹³ Norris, TR. Vol. IV, 79:25 - 80:14 and 88:18 - 89:5.

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Road connects with Pioneer Highway.¹⁴ Old Pacific Highway generally runs parallel alongside the portion of the BNSF main line north of Logen Road until it crosses the tracks (becoming 102nd Street) and intersects with Pioneer Highway. Pioneer Highway generally runs parallel to the BNSF main line on the east side of the tracks.¹⁵

15 The active safety features currently installed at the Logen Road grade crossing include flashing light signals, automatic gates, and warning bells; passive safety features include a yellow highway-rail grade crossing advance warning sign, a white "crossbuck" highway-rail grade crossing sign on each side of the tracks, as well as painted pavement markers in advance of the intersection.¹⁶

16 The closest alternate crossing to Logen Road is located at 300th Street NW, also known as Dettling Road, approximately one-half mile to the north.¹⁷ The 300th Street NW grade crossing is currently a single-track crossing in a rural area surrounded by open farm fields. In its present configuration, its active safety features consist of multiple flashing light signals (including mast arms extending over and above the roadway), automatic gates, and warning bells; its passive safety features include a yellow highway-rail grade crossing advance warning sign, a white "crossbuck" highway-rail grade crossing sign on each side of the tracks, as well as painted pavement markers in advance of the intersection¹⁸. In BNSF's request to close the

¹⁴ Pioneer Highway was previously also known as State Highway 530 (Hwy 530); the traffic study relied upon in this case (Exh. No. 7) refers to both names. See Bloodgood, TR. 118:7-20.

¹⁵ Exh. No. 7, *Logen Road Railway Crossing Closure – Traffic Impact Analysis*, at Figure 1; see also Exh. No. 16 and Exh. Nos. 17-18 (the T-intersection of Logen Road and Old Pacific Highway is visible in the background of Exhibit No. 18).

¹⁶ Exh. No. 17, pages 1-2; see also Hunter, TR Vol. IV, at 247:12-14.

¹⁷ Norris, TR. Vol. IV, 76:20-24; see also Exh. No. 7, at page 3 and at Figure 1 (no scale on map). At hearing, the County Engineer noted another acceptable alternate crossing at 102nd Street and Pioneer Highway, located less than another half-mile to the north of Dettling Road. See Bloodgood, TR. Vol. IV, 136:23 – 137:4.

¹⁸ Exh. No. 17, pages 5-6.

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Logen Road crossing, it pledged to work with Snohomish County to upgrade the 300th Street NW crossing to address any resulting increase in traffic.¹⁹

17 The closest alternate crossing south of Logen Road is located at 271st Street NW, approximately 1.5 miles to the south. The 271st Street grade crossing is within the City of Stanwood, has three sets of tracks, and experiences much greater traffic volume than either Logen Road or 300th Street NW.²⁰ Active safety features at the 271st Street NW crossing include flashing light signals, automatic gates, and warning bells; passive safety features include a yellow highway-rail grade crossing advance warning sign, a white "crossbuck" highway-rail grade crossing sign on each side of the tracks also indicating "3 tracks," as well as painted pavement markers in advance of the intersection.²¹

III. EVIDENCE

A. Proponent – Burlington Northern.

18 BNSF presented testimony and exhibits that demonstrated the public safety concerns motivating the railway to seek closure of the Logen Road grade crossing.

19 BNSF witness Rick Wagner explained the primary purpose of the Stanwood Siding Extension Project is to allow freight trains of up to approximately 8,500 feet (in excess of 1.5 miles) in length to pull off the BNSF main line and park in order to meet and pass other trains.²² BNSF currently has between 8 and 10 freight trains that transit the Stanwood area each day, but historically there have been as many as 15 per

¹⁹ Exh. No. 1 (Petition), Section 5, ¶ 1. Although not expressed in the Petition, BNSF also apparently plans to upgrade the crossing at 102nd Street to accommodate the second set of tracks from the siding; it is unclear in the record if BNSF and/or Snohomish County plan any road improvements at the 102nd Street crossing. See Wagner, TR. Vol. IV, 29:18-22.

²⁰ See Exh. No. 7, at pages 4-5 and at Figure 2.

²¹ Exh. No. 17, pages 3-4.

²² Wagner, TR. Vol. IV, 11:1-14.

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day.²³ These freight trains would typically pause on the siding for short periods of time to meet and pass a passenger train, but in some circumstances could remain parked, blocking the Logen Road crossing, for up to several hours to meet and pass another freight or passenger train.²⁴

- 20 BNSF witness Kevin Jeffers, WSDOT's Project Manager for the Stanwood Station, noted that Amtrak passenger trains transit through Stanwood 4 times each day.²⁵ He then explained WSDOT's plans to complete a new train station in Stanwood and implement a passenger stop at the new station. Mr. Jeffers testified that freight trains parked on the extended siding between the new station and the Logen Road crossing would either entirely block the crossing or create a visibility hazard for drivers at the Logen Road crossing, preventing a clear view of trains proceeding on the main line and perhaps tempting drivers to go around the lowered gates and across both sets of tracks.²⁶ BNSF witness David Agee, the railway's Manager of Field Safety, echoed these concerns.²⁷
- 21 BNSF witness Gary Norris, a Senior Engineer for Garry Struthers Associates, Inc., testified about the traffic impact analysis (traffic study) he completed in March 2009 to evaluate the potential traffic impacts of closing the Logen Road at-grade crossing.²⁸ The study was based on traffic data collected in July 2008, October 2008, and early March 2009.²⁹

²³ *Id.*, at 11:18 – 12:1.

²⁴ *Id.*, at 16:5-24 and 41:8-14.

²⁵ Jeffers, TR. Vol. IV, 49:22 – 50:19 and 52:11 – 53:8.

²⁶ *Id.*, at 50:20 – 52:5 and 53:9 – 54:7.

²⁷ Agee, TR. Vol. IV, 147:5 – 148:6 and 151:23 – 153:10; *see* Exh. No. 12, pages 6-7; *see also* Exh. No. 13, at pages 18-19.

²⁸ Norris, TR. Vol. IV, 72:1 – 73:1.

²⁹ *See* Exh. No. 7, at 4 and 5.

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- 22 The traffic study found daily volume to be 142 vehicles on Logen Road,³⁰ with afternoon peak hour volume of approximately 14 vehicles.³¹ If the Logen Road crossing is closed, the study predicts that the majority of vehicles would be diverted to Pacific Highway to cross the tracks at 271st Street NW, causing only an insignificant increase in traffic at the alternate intersection in downtown Stanwood, where there are nearly 8,000 vehicles per day.³² Some vehicles might divert north to cross the tracks at 300th Street NW, where the daily traffic counts show approximately 800 vehicles per day.³³ Mr. Norris recommended closing the Logen Road crossing.³⁴
- 23 The traffic study did note that closure of Logen Road would limit emergency response to the Logen Road area to only the easterly access points off Pioneer Highway. Due to roadway geometrics potentially hindering access for larger trucks coming from the north, Mr. Norris predicted that the City of Stanwood / Camano Island Fire Department would become the *de facto* primary responders to this area. Given their closer geographic proximity and shorter response times (as compared to Snohomish County Fire District No. 14), the study concludes there will not be any significant adverse impact on emergency response.³⁵
- 24 BNSF witness James Bloodgood, Traffic Engineer for Snohomish County, is familiar with the Logen Road crossing, reviewed Mr. Norris' traffic study, and heard Mr. Norris testify at hearing. Mr. Bloodgood concurred with Mr. Norris' conclusions that closing the Logen Road crossing and diverting its traffic to either or both of the alternate crossings would not have any significant impacts on traffic congestion or

³⁰ *Id.*, at 4 (traffic data provided by Snohomish County, obtained Thursday, July 10, 2008). In its Petition, BNSF had estimated only 75 vehicles per day. *See* Exh. No. 1, at 3 (Section 4, ¶ 2).

³¹ *Id.* (traffic data collected by Norris on Tuesday, March 3, 2009); *see also* Norris, TR. Vol. IV, 74:3 – 75:4.

³² *Id.*, at 7; *see also* Norris, TR. Vol. IV, 77:18 – 79:24.

³³ *Id.*, at 5.

³⁴ *Id.*, at 8.

³⁵ *Id.*, at 6; *see also* Norris, TR. Vol. IV, 83:1 – 87:13, 106:23 – 109:16, and 110:17 – 111:7; *see also* Exhibit 29 (mutual aid agreements).

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emergency response.³⁶ Mr. Bloodgood stated the County's position supporting closure of the Logen Road crossing.³⁷

25 BNSF witness David Agee, Manager of Field Safety and Operation Lifesaver trainer, testified regarding the routine failure of the general public to respect grade crossing warning signals and the common occurrence of attempts to "beat the train."³⁸ Mr. Agee also testified that grade crossings intersecting both a main line and siding track create particular safety hazards, including the potential that people, confused by trains stopped on a siding but not wholly blocking a crossing, might attempt to drive around the lowered gates only to be hit by an oncoming train on the main line.³⁹

26 BNSF witness Danniell MacDonald, Manager of Engineering, testified that when trains block the Logen Road crossing for extended periods, the active warning devices (flashing lights, bells, and gates) would remain active and effectively close the crossing for the full length of time needed for the trains to meet and pass.⁴⁰ Mr. MacDonald also explained his concerns with the relatively short sight distances associated with the curve in the railroad tracks at the Logen Road crossing (about 400 feet to the south and 800 feet to the north), making it nearly impossible to construct a safe crossing at that location when obstructed sightlines caused by freight trains parked on the siding are considered.⁴¹ Mr. MacDonald also expressed his opinion that 4-quadrant gates could not be installed safely or appropriately at Logen Road, particularly due to the narrowness of the roadway.⁴²

³⁶ Bloodgood, TR. Vol. IV, 118:25 – 119:21.

³⁷ *Id.*, at 120:5-25 and 121:4-7; *see also* Exh. No. 9.

³⁸ Agee, TR. Vol. IV, 146:10 – 148:6 and 160:13 – 164:6

³⁹ *Id.*, at 167:15 – 170:23 and 174:14 – 175:1.

⁴⁰ MacDonald, TR. Vol. IV, 182:3 – 186:8.

⁴¹ *Id.*, at 182:18 – 183:6, 188:1-24, 192:5-22, and 196:15 – 198:19.

⁴² *Id.*, at 186:9 – 187:3, 201:12 – 204:24, and 206:3 – 207:14.

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B. Opponent – Lynn Logen.

27 Mr. Logen testified on his own behalf and explained that his family owns farm property on both sides of the railroad tracks. Members and employees of the Logen family use their namesake crossing to move farm equipment (tractors, etc.) between their parcels of land. If the Logen Road crossing were eliminated, Mr. Logen claims that he would occasionally be forced to drive slow-moving farm equipment on Old Pacific Highway and Pioneer Highway, both of which have posted speed limits of 50 miles per hour. Further, if he made use of the Dettling Road crossing, Mr. Logen expressed concerns about the appreciable downgrade leading to the crossing from the east and the ability of a tractor with a heavy load to stop its momentum before reaching the tracks.⁴³

28 In Mr. Logen's opinion, closing the Logen Road crossing would create a new hazard for himself as well as inconvenience the traveling public by forcing slow farm vehicles onto a major thoroughfare.⁴⁴ He conceded, however, that his family had not farmed the parcel that would require transporting the tractor for at least 15 years and that he was not aware of any accidents involving tractors on the local highways.⁴⁵

29 Mr. Logen suggested alternatives to closing, including grade separation and the installation of 4-quadrant gates accompanied by traffic-channeling medians.⁴⁶

C. Commission Staff.

30 Commission Staff presented testimony and exhibits supporting the railway's petition to close the Logen Road at-grade crossing due to the siding extension forcing drivers to cross a second set of tracks.

⁴³ Logen, TR. Vol. IV, 267:24 – 273:20.

⁴⁴ *Id.*, at 274:2-23.

⁴⁵ *Id.*, at 288:19 – 289:3 and 292:20 – 293:8.

⁴⁶ *Id.*, at 275:14 – 277:13 and 278:15-23.

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- 31 Kathy Hunter, the Commission's Deputy Assistant Director of Transportation Safety, testified generally on Commission policies regarding rail safety. In her opinion, adding a second set of tracks to the Logen Road crossing creates an exceptionally hazardous condition; considering the limited sight distances associated with the track's curvature and parked freight trains using the siding, merits closure of the crossing upon construction of the siding extension.⁴⁷
- 32 Further, Ms. Hunter testified that diverting traffic from the Logen Road crossing to either the Dettling Road crossing or the 271st Street NW crossing would not result in a higher risk of accidents due to increased traffic volumes, particularly after BNSF upgraded the active warning devices at the 271st Street NW crossing in Stanwood.⁴⁸ In addition, Ms. Hunter related her discussion with local fire officials who generally worried about losing an optional route for emergency response but raised no specific concerns with regard to the elimination of the Logen Road crossing.⁴⁹
- 33 Finally, Ms. Hunter discussed Mr. Logen's desire to avoid driving his tractor on Old Pacific Highway and Pioneer Highway and weighed the safety risks of occasional slow-moving farm equipment on a highway against the risk of vehicle collisions with high-speed passenger trains at the Logen Road crossing. In her opinion, the risks of leaving the dual-track crossing open, particularly for slow-moving farm equipment, outweigh the potential hazards of operating the tractor on local highways.⁵⁰
- 34 Due to the exceptionally dangerous conditions presented after extending the siding to add a second set of tracks at the crossing, Commission Staff recommended closure of the Logen Road crossing. Ms. Hunter found the alternate routes reasonable and also concluded that neither public convenience nor necessity required the crossing to remain open.⁵¹

⁴⁷ Hunter, TR. Vol. IV, 232:7 – 233:11 and 244:19 – 245:7.

⁴⁸ *Id.*, at 234:3 – 236:13 and 243:3 – 244:17.

⁴⁹ *Id.*, at 236:14 – 237:10.

⁵⁰ *Id.*, at 239:9 – 241:4 and 245:9 – 247:8.

⁵¹ *Id.*, at 241:14-23.

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D. Snohomish County

35 Snohomish County did not directly present testimony or evidence at the hearing.⁵² However, through BNSF's presentation of witness James Bloodgood, the County reiterated its position supporting BNSF's petition to close the Logen Road grade crossing.⁵³

E. Public Comment

36 Nine members of the public spoke about the proposed closure of the Logen Road at-grade crossing at the public comment hearings held on Monday evening, March 30, 2009.⁵⁴ Several supported the new train station in Stanwood, but nobody wanted to see the Logen Road grade crossing closed unless absolutely necessary. Opponents to the closing expressed concerns ranging from being forced to navigate the alternative route of 300th Street NW⁵⁵ to encountering greater difficulty accessing downtown Stanwood.⁵⁶

37 In addition, the Commission received several dozen written comment letters from individuals opposed to the closure of the Logen Road crossing.⁵⁷ In one of those letters, Fire Chief Dale Fulfs of the North County Regional Fire Authority expressed

⁵² James Bloodgood, the County's Traffic Engineer, testified at hearing. However, BNSF called Mr. Bloodgood as a witness, *not* Snohomish County.

⁵³ Bloodgood, TR. Vol. IV, 120:5-25; *see also* Exh. No. 2, Waiver of Hearing (26 Jan 09) and Exh. No. 9. *See also* Snohomish County's Post-Hearing Filing.

⁵⁴ *See* TR. Vol. V., 394:1 – 424:20.

⁵⁵ *See, e.g.*, Barbara Dadd Shaffer, TR. Vol. V., 409:5 – 410:25 (characterizing the approach to the railroad crossing as a "windy steep stretch") and Albert Burkland, TR. Vol. V., 419:19 – 421:12 (calling it "kind of a nasty road to take, it's got a big bend in it").

⁵⁶ *See, e.g.*, Tim Gray, TR. Vol. V., 411:5 – 413:15; Mary Lanier, TR. Vol. V., 413:20 – 417:2; and Marilyn Templeton, TR. Vol. V., 417:10 – 419:10.

⁵⁷ *See* Ex. No. 31 (combined public comment exhibit containing all written and electronic submissions in this docket).

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general concerns about the possibility of increased response times if the option of using Logen Road were eliminated.

IV. DISCUSSION AND DECISION

A. Exhaustive Evaluation of Grade Separation Not Required for Additional Tracks where Demonstrably Impracticable

38 Mr. Logen argues for the first time on brief that BNSF's plan to extend an existing siding across Logen Road requires the railway to seek a Commission determination on the practicability of separation of grades.⁵⁸ In short, Mr. Logen contends that BNSF's petition to close the crossing must be denied because it is incomplete by failing to address the possibility that the siding extension project could undertake the separation of grades as required by RCW 81.53.020.⁵⁹ However, reading the provisions of RCW 81.53 together as a whole, it is clear that the Commission has jurisdiction to adjudicate BNSF's petition as presented.

39 As Mr. Logen points out, the Legislature has decreed that "whenever *practicable*," railway-highway crossings must be accomplished by means of grade separations, such as overpasses or underpasses.⁶⁰ The underlying principle for this law is the accepted theory that all grade crossings are inherently dangerous.⁶¹ The statute instructs that when determining whether a separation of grades is practicable, the Commission must consider the following factors:

⁵⁸ Final Brief of Lynn Logen, ¶¶ 2-8. Mr. Logen's argument in this regard ignores the reality of the existing at-grade crossing at Logen Road which he seeks to preserve.

⁵⁹ *Id.*, at ¶ 4.

⁶⁰ RCW 81.53.020 (emphasis added).

⁶¹ See *Reines v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 195 Wn. 146, 150, 80 P.2d 406, 407 (1938); *State ex rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla County*, 5 Wn.2d 95, 104, 104 P.2d 764 (1940); *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 250-51 and 257, 212 P.2d 829, 831-32 and 835 (1949).

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the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry.⁶²

Mr. Logen argues that because the record lacks all the listed information, BNSF's Petition must be rejected. This selective reading of the statute is inappropriate.

40 The first sentence of RCW 81.53.020 states grade separation as a requirement only "when practicable." Further, the majority of the information listed in the statute is contained within several exhibits admitted at hearing.⁶³ Notably, Mr. Logen himself concedes that the "present use of Logen Road crossing is insufficient to warrant the expense of grade separation."⁶⁴ The statute does not require the wasteful gathering of evidence for a course of action that is clearly implausible. Thus, the record assembled in this docket is indeed sufficient to determine that grade separation at Logen Road is impracticable.

41 Mr. Logen identifies no section within RCW 81.53 that prohibits BNSF from filing a single petition for altering or closing an existing crossing when public safety so requires, even if the reason is the proposed addition of a second set of tracks. Under RCW 81.53.060, the Commission may consider various options in evaluating and acting on the petition, including outright denial or the imposition of further modifications to the crossing (including grade separation) to ensure public safety upon the expansion of the crossing to include the siding tracks. In this case, the record demonstrates that grade separation is impracticable.

⁶² RCW 81.53.020.

⁶³ See Exh. No. 7 (traffic study); Exh. No. 16 (aerial photograph of Logen Road area); Exh. No. 17 (photographs of Logen Road and other local grade crossings); and Exhibit B (driving directions for ALJ's area tour).

⁶⁴ Logen, TR. Vol. IV, 275:20-22.

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B. Closure

- 42 As referenced above, RCW 81.53.060 allows for railroad companies to file written petitions with the Commission seeking the “closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing” when the petitioner alleges “that the public safety requires” such action. BNSF filed its petition in this matter in accordance with this statute and therefore carries the burden of proving, by a preponderance of the evidence, that public safety requires closure of the Logen Road grade crossing.⁶⁵
- 43 In evaluating petitions for closure of a grade crossing found to be dangerous and unsafe, the Commission is authorized to “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.”⁶⁶ Further, the Commission has previously explained that the absence of evidence of accidents at a given crossing neither demonstrates that it is more safe or less dangerous than other similar crossings nor provides any predictive value as to future accidents.⁶⁷
- 44 The Legislature has long recognized the need for clear fields of vision around grade crossings and prohibited structures or the spotting of trains, railcars, or railway equipment within one hundred feet of a grade crossing.⁶⁸ Here, the Logen Road crossing is as inherently dangerous as any other grade crossing and, due to its location along a curve in the tracks, perhaps even more hazardous. Adding the siding tracks will magnify the potential dangers by obstructing motorists’ vision as they approach the crossing and also cause confusion on the regular occasions where a train blocks the crossing for appreciable lengths of time.

⁶⁵ Order 01, ¶ 5.

⁶⁶ *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 254 (1949). See also Order 02, ¶ 6 and Order 03, ¶ 8.

⁶⁷ *Burlington Northern and Santa Fe Railway Company v. City of Sprague*, Docket TR-010684, Fourth Supplemental Order (January 10, 2003), ¶¶ 40-41.

⁶⁸ See RCW 81.53.080.

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- 45 The addition of another set of tracks will pose the additional problem that a train waiting on the siding track nearest a driver may obstruct the view of oncoming train traffic on the main line.⁶⁹ Several BNSF witnesses expressed concerns that persons waiting at a gated crossing not fully blocked by an idle freight train might only observe the train stopped on the siding and become impatient with the apparently unnecessary delay. If they imprudently drive around the gates, they could be struck by an oncoming high-speed passenger train or another freight train. Although this reduced visibility situation might not be presented to motorists stopped on the main line side of the crossing, the potential for impatient drivers skirting safety features will be increased at a Logen Road crossing that includes multiple tracks.
- 46 Further, the BNSF witnesses explained that rail operations could regularly require freight trains to block the Logen Road crossing, occasionally for lengthy periods of time. This situation creates uncertainty whenever a train rolls into the crossing and stops, as there is no method for notifying the motoring public of how long the train will block the crossing.⁷⁰ Even if BNSF obtained an exemption from the Commission's "ten minute rule" regarding blockage of public grade crossings, the potential for public confusion and frustration would remain.⁷¹
- 47 The evidence presented in this matter demonstrates that Logen Road will become a more dangerous crossing after completion of the siding project. In the past, based on concerns regarding reduced visibility and multiple tracks, the Commission has

⁶⁹ See *BNSF v. City of Sprague*, Docket TR-010684, Fourth Supplemental Order, ¶ 53, citing to *BNSF v. Skagit County*, Docket TR-940282 (December 13, 1996); *BNSF v. City of Ferndale*, Docket TR-940330 (March 31, 1995); and *Spokane County v. Burlington Northern, Inc.*, Cause TR-1148 (September 1985).

⁷⁰ A creative member of the public suggested placing electronic message board signage at the intersection of Logen Road and Old Pacific Highway to display the projected delay times. See Barbara Dadd Schaffer, TR. Vol. V, 410:12-25. However, the record contains no further details on the technical feasibility of such a display or what party might provide the data for display.

⁷¹ WAC 480-62-140 provides a method for BNSF to seek an exemption to the WAC 480-62-220 rule prohibiting blockage of a grade crossing for more than 10 minutes, if reasonably possible. Although the language of WAC 480-62-220 arguably allows for crossings to be blocked for longer periods when "splitting" the train is not reasonably possible, the railroad could be assured that it would not be penalized for violating a Commission rule by obtaining such an exemption. See also Post-Hearing Brief on Behalf of Commission Staff, ¶¶ 8-10 and 20-21.

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characterized such crossings as “especially hazardous,”⁷² “particularly dangerous,”⁷³ or “exceptionally hazardous.”⁷⁴ There is no evidence in the record to support any other conclusion in this matter: after completion of the siding project, Logen Road will become a much more dangerous at-grade crossing.

48 Logen Road is already an at-grade crossing and, until Mr. Logen’s post-hearing brief, no party suggested it practicable to retain the crossing by its conversion to a below- or above-grade crossing. Aside from upgrading the existing active safety features from two quadrant gates to four quadrant gates, no party offered options for realistic mitigation measures if the Logen Road crossing were to remain open.⁷⁵ Other than Mr. Logen, all other witnesses testifying on the issue agreed that the limited breadth of Logen Road prevented installation of four quadrant gates for safe and proper use according to their intended purpose.

49 Here, after completion of the siding project, Logen Road will become so unsafe and dangerous that it must be closed to further public travel. Therefore, by law, it can only remain open if “the need for the crossing is so great that it must be kept open notwithstanding its dangerous condition.”⁷⁶ In making this determination, the Commission evaluates (a) the amount and character of travel on the railroad and on the highway, (b) the number of people affected by the closure, (c) whether there are readily available alternate crossings in close proximity that can handle any additional

⁷² See *BNSF v. City of Sprague*, Docket TR-010684, ¶ 53.

⁷³ See *BNSF v. Skagit County*, Docket TR-940282, pg. 4.

⁷⁴ See *BNSF v. City of Mount Vernon*, Docket TR-070696, Order 06, ¶ 60 and ¶ 71.

⁷⁵ Mr. Logen’s Final Brief does suggest tree cutting and clearing to remove sight obstructions for the traveling public, but there is no evidence in the record indicating the ownership of the forested land or the end result on visibility if Mr. Logen’s clear-cutting suggestion is implemented. See Final Brief of Lynn Logen at ¶ 53.

⁷⁶ See *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 254, 212 P.2d 829 (1949).

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traffic resulting from the closure, and (d) whether the alternative crossings are safer than the crossing proposed for closure.⁷⁷

- 50 The record contains testimony from Mr. Logen and members of the public about the perceived need for the Logen Road crossing and the inconveniences that would be imposed by its closure. However, BNSF presented a traffic study showing that fewer than 150 cars crossed the tracks at Logen Road each day. No witness questioned the accuracy of the traffic study. The evidence in this case demonstrates that traffic on Logen Road is very light and that rail traffic, now consisting of approximately a dozen total trains per day, will be increasing in the near future.
- 51 The number of people affected by the closure of the Logen Road crossing is not insignificant, but the rural area most directly affected by BNSF's proposed closure is relatively sparsely populated when compared to its Stanwood neighbors to the south. Even so, under normal conditions, the nearby 300th Street NW and 271st Street NW crossings are readily available (as is the crossing further north at 102nd Street). Mr. Norris' traffic analysis demonstrates that these alternate crossings can absorb additional traffic diverted from Logen Road for all normal transportation needs, including emergency response vehicles.
- 52 Finally, after the road upgrades pledged by BNSF for the 300th Street NW (Dettling Road) crossing and the warning signal updates for the 271st Street NW crossing suggested by the diagnostic team cited by Commission Staff witness Kathy Hunter are in place, the alternate crossings will be safer than they are today. A full and complete analysis regarding the Logen Road at-grade crossing demonstrates that public safety requires its closure and that public need and convenience are not so great as to require its retention despite its dangerous condition.
- 53 BNSF may close the Logen Road crossing to the public, but only after upgrading and updating the safety features at 271st Street NW as per the direction of a diagnostic team.⁷⁸ Further, BNSF must also work with Snohomish County to make street

⁷⁷ See *BNSF v. City of Ferndale*, TR-940330 (March 31, 1995); *BNSF v. Skagit County*, TR-940282 (December 13, 1996); and *Union Pacific Railroad v. Spokane County*, TR-950177 (July 3, 1996).

⁷⁸ See Post-Hearing Brief on Behalf of Commission Staff, ¶ 32.

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improvements at 300th Street NW and install a cul-de-sac to facilitate turnaround traffic on the east side of the railroad tracks on Logen Road, too.⁷⁹ Costs for these road improvements shall be apportioned among BNSF, the City of Stanwood, and Snohomish County as appropriate under RCW 81.53.

C. Private Crossing Not Required for Closure of Logen Road

54 Mr. Logen has indicated his desire to have a private crossing agreement with BNSF if the Commission decides to grant the railway's petition and close Logen Road.⁸⁰ According to the FRA, private crossings typically exist on roadways not open to use by the public nor maintained by any public authority and are governed by an agreement between a land owner and the railroad. Normal uses include farm crossings that provide access between tracts of land lying on both sides of the railroad. Some private crossings have sufficient train and roadway traffic volume that they require active traffic control devices.⁸¹

55 In this case, the only rationale for converting the current at-grade crossing at Logen Road to a private crossing is for the Logen family to retain the option of moving a tractor or other farm equipment across the tracks. Mr. Logen admits that this has not been necessary in recent memory, perhaps for as long as a decade and half.

56 As noted above, the FRA specifically includes farm crossings within its listing of appropriate uses for private crossings. However, the evidence presented in this case does not demonstrate the need for special accommodation of any existing farming businesses or hobbies that would be adversely impacted by the closure of Logen Road. Therefore, the Commission does not consider creation of a private crossing.

⁷⁹ Upon closure of the Logen Road crossing, Snohomish County will apparently retain authority to determine where to place the barricade creating a dead-end on the west side of the tracks.

⁸⁰ Logen, TR. 274:12-16 and 281:15 – 282:13.

⁸¹ Exh. No. 101, pp. 191-193.

FINDINGS OF FACT

- 57 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:
- 58 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the placement and conditions of operation of crossings at grade of railroad tracks with public roadways within the State of Washington.
- 59 (2) The Burlington Northern and Santa Fe Railway Company (BNSF) petitioned on January 22, 2009, for authority to close the highway-railway crossing at Logen Road in Snohomish County, Washington.
- 60 (3) The Logen Road at-grade crossing is located to the north of the city limits of Stanwood. On an average day, four Amtrak passenger trains, eight to ten freight trains, and approximately 140 vehicles make use of the crossing.
- 61 (4) The Logen Road crossing is within one-and-one-half miles of a crossing to the south (271st Street NW) and approximately one-half mile of a crossing to the north (300th Street NW / Dettling Road). One or both of those crossings provide the general public with suitable alternative access across the tracks with a minimum of inconvenience during normal conditions.
- 62 (5) Closure of the Logen Road crossing will divert a majority of its current traffic southward to 271st Street NW in Stanwood with the remainder diverted northward to 300th Street NW / Dettling Road.
- 63 (6) At-grade crossings with more than one set of tracks are more dangerous than at-grade crossings with only a single set of tracks. When a siding track creates the potential to obstruct a motorist's view of the main line track, the crossing becomes exceptionally hazardous.

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- 64 (7) Closure of the Logen Road crossing will not detrimentally impact emergency response times in the local area.

CONCLUSIONS OF LAW

65 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

- 66 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding.
- 67 (2) The Logen Road crossing in Snohomish County, Washington, is dangerous. WSDOT's addition of a second set of tracks to this crossing magnifies the danger presented to vehicle traffic, creating an exceptionally hazardous crossing upon completion of WSDOT's siding extension project.
- 68 (3) Under normal conditions, traffic can conveniently use the 271st Street NW crossing to the south (in Stanwood) or the 300th Street NW / Dettling Road crossing to the north.
- 69 (4) Closure of the Logen Road crossing will result in inconvenience to some persons who now use the crossing. Mitigating measures, such as upgrading and updating the safety features at the 271st Street NW at-grade crossing, creation of a turnaround cul-de-sac on the easterly approach to the railroad tracks on Logen Road, and certain road improvements to the 300th Street NW crossing, can ameliorate concerns about closure of the Logen Road crossing.
- 70 (5) The public convenience and necessity do not require that the Logen Road crossing remain open. The Commission should grant BNSF's petition and should order that the Logen Road crossing in Snohomish County be closed to the public, upon conditions that will mitigate the inconvenience of closure.

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- 71 (6) The concerns raised by the North County Regional Fire Authority do not indicate that the continued opportunity to make use of the Logen Road crossing is necessary to protect the health, safety and welfare of citizens working or residing in the vicinity of the Logen Road at-grade crossing.
- 72 (7) Grade separation at the existing Logen Road crossing for the purposes of extending an additional siding track through the crossing is not practicable.

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ORDER

THE COMMISSION ORDERS:

- 73 (1) The Commission grants, subject to conditions, Burlington Northern's petition
to close the Logen Road at-grade crossing to public use.
- 74 (2) Authority to close the Logen Road crossing is granted upon the following
conditions, which must be met prior to closure:
- (a) First, BNSF shall upgrade and update the safety features at the 271st Street
NW at-grade crossing in Stanwood and, as directed by a diagnostic team,
provide proportionate funding for pedestrian safety improvements (i.e.,
sidewalks).
- (b) Second, BNSF shall work with Snohomish County to improve road
conditions at the 300th Street NW / Dettling Road grade crossing.
- (c) Third, BNSF shall work with Snohomish County to construct a turnaround
cul-de-sac on the approach to the railroad tracks on Logen Road.
- 75 (3) The Commission retains jurisdiction over the subject matter and the parties to
the proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective October 21, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

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NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order, any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such an answer.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and twelve (12) copies of any Petition or Answer must be filed by mail delivery to:

Attn: David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

[Service Date November 30, 2009]

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

BNSF RAILWAY COMPANY,	)	DOCKET TR-090121
)	
Petitioner,	)	ORDER 04
)	
v.	)	FINAL ORDER GRANTING
	)	PETITION FOR
SNOHOMISH COUNTY,	)	ADMINISTRATIVE REVIEW;
	)	MODIFYING CONDITIONS IN
Respondent.	)	INITIAL ORDER; DENYING
	)	PETITION TO REOPEN THE
	)	RECORD
.....)	

Synopsis: In this Order, we grant Burlington Northern Santa Fe's petition for administrative review and modify the conditions in the Initial Order relating to the order in which the railroad must close the crossing; upgrade the 300th Street NW / Dettling Road crossing and construct the turnaround at Logen Road. We deny the railroad's petition to reopen the record as unnecessary.

I. INTRODUCTION

- 1 **Nature of Proceeding.** Docket TR-090121 involves a petition by Burlington Northern Santa Fe Railway Company (Burlington Northern or BNSF) to close a railroad-highway grade crossing located at Logen Road, nearby to Stanwood, Snohomish County, Washington (US DOT #084713P) in accordance with Revised Code of Washington (RCW) 81.53.060.
- 2 **Appearances.** Bradley Scarp and Kelsey Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington; represent Burlington Northern. Justin W. Kasting and Matthew A. Otten, Civil Division Deputy Prosecuting Attorneys, Everett, Washington, represent Snohomish County (County). Lynn F. Logen, *pro se*, Bellevue, Washington, represents himself and the interests of his family (Logen).

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Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).¹

3 **Initial Order:**² The Initial Order, entered on October 21, 2009, granted Burlington Northern's petition to close the Logen Road crossing, requiring the railroad to complete the following conditions prior to closing the crossing: (1) upgrade and update the active warning devices and signage at the 271st Street NW at-grade crossing and provide proportionate funding for pedestrian safety improvements (i.e., sidewalks) as directed by a diagnostic team; (2) work with Snohomish County to improve road conditions at the 300th Street NW / Dettling Road at-grade crossing; and (3) provide funding for and work with Snohomish County to construct a turnaround cul-de-sac on the approach to the railroad tracks on Logen Road.³

4 **Petition for Administrative Review and Petition to Reopen:** On November 12, 2009, Burlington Northern filed a petition to reopen the record and a petition for administrative review of the Initial Order. The railroad requests the Commission modify the Initial Order to allow the crossing to be closed before constructing the turnaround cul-de-sac at Logen Road. Burlington Northern requests the Commission reopen the record to admit an e-mail from a project engineer describing the operational issues that require a modification to the Initial Order.

5 **Commission Decision:** In this order, the Commission grants Burlington Northern's petition for administrative review, modifying the Initial Order to require the Logen Road crossing to be closed prior to construction of the turnaround cul-de-sac at the crossing. The Commission denies the railroad's petition to reopen the record, finding the additional information unnecessary in considering the petition for administrative review.

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while an administrative law judge (ALJ) and/or the Commissioners make the decision. To assure fairness, the Commissioners, the presiding ALJ, and the Commissioners' accounting and policy advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See RCW 34.05.455.*

² The procedural history of this docket is set forth in detail in the Initial Order, Order 03, and will not be repeated in this order.

³ Order 03, ¶ 74.

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II. BACKGROUND

6 We repeat the relevant facts from the Initial Order, which facts remain uncontested:⁴

Burlington Northern runs a main line track, as well as various side tracks, north and south through Snohomish County and the City of Stanwood. There are several roads running east and west that cross the BNSF line as it runs northbound from Stanwood and into the county's unincorporated area. As pertinent to this matter, these roadways include 271st Street NW, Logen Road, and 300th Street NW (also known as Dettling Road).⁵

WSDOT's Amtrak division is constructing a new train station in Stanwood. As part of this project to expand existing passenger train service in this corridor, WSDOT is extending the existing BNSF siding above Stanwood from its present length of 6,800 feet to over 10,000 feet, enabling longer freight trains to meet and pass along BNSF's main line.⁶ The lengthened siding will add a second set of tracks to the existing grade crossing at Logen Road as well as the two grade crossings located immediately to the north.⁷ Therefore, citing the interests of safety and improved operations for both freight and passenger trains, BNSF seeks permission to close only the Logen Road grade crossing.⁸

The Logen Road grade crossing is located along a curved portion of track in a rural area north of Stanwood characterized by trees, agricultural use and some rural homes.⁹ Quite nearby to the west (where the roadway is also

⁴ *Id.*, ¶¶ 12-17.

⁵ *See* Exh. Nos. 1, 16, and 17 (the latter two exhibits consist of photographs that provide a generalized overview of the relevant area and individual depictions of each grade crossing). Also peripherally relevant is the at-grade crossing near the intersection of 102nd Street and Pacific Highway, located another half-mile north of the 300th Street NW at-grade crossing.

⁶ Wagner, TR. 10:25 - 15:15; *see also* Exh. No. 4 and Exh. No. 5.

⁷ *Id.*, at 16:5-7 (second set of tracks at Logen Road) and Hunter, TR. 244:19 - 245:8 (second set of tracks at 300th Street NW and 102nd Street).

⁸ Exh. No. 1, Petition for the Closure of a Highway-Rail Grade Crossing (January 22, 2009), Section 5, ¶ 1.

⁹ Norris, TR. 79:25 - 80:14 and 88:18 - 89:5.

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known as 292nd Street NW), Logen Road connects with the Old Pacific Highway; to the southeast, Logen Road connects with Pioneer Highway.¹⁰ Old Pacific Highway generally runs parallel alongside the portion of the BNSF main line north of Logen Road until it crosses the tracks (becoming 102nd Street) and intersects with Pioneer Highway. Pioneer Highway generally runs parallel to the BNSF main line on the east side of the tracks.¹¹

The active safety features currently installed at the Logen Road grade crossing include flashing light signals, automatic gates, and warning bells; passive safety features include a yellow highway-rail grade crossing advance warning sign, a white "crossbuck" highway-rail grade crossing sign on each side of the tracks, as well as painted pavement markers in advance of the intersection.¹²

The closest alternate crossing to Logen Road is located at 300th Street NW, also known as Dettling Road, approximately one-half mile to the north.¹³ The 300th Street NW grade crossing is currently a single-track crossing in a rural area surrounded by open farm fields. In its present configuration, its active safety features consist of multiple flashing light signals (including mast arms extending over and above the roadway), automatic gates, and warning bells; its passive safety features include a yellow highway-rail grade crossing advance warning sign, a white "crossbuck" highway-rail grade crossing sign on each side of the tracks, as well as painted pavement markers in advance of the intersection¹⁴ In BNSF's request to close the Logen Road

¹⁰ Pioneer Highway was previously also known as State Highway 530 (Hwy 530); the traffic study relied upon in this case (Exh. No. 7) refers to both names. See Bloodgood, TR. 118:7-20.

¹¹ Exh. No. 7, *Logen Road Railway Crossing Closure – Traffic Impact Analysis*, at Figure 1; see also Exh. No. 16 and Exh. Nos. 17-18 (the T-intersection of Logen Road and Old Pacific Highway is visible in the background of Exhibit No. 18).

¹² Exh. No. 17, at 1-2; see also Hunter, TR. 247:12-14.

¹³ Norris, TR. 76:20-24; see also Exh. No. 7, at 3 and at Figure 1 (no scale on map). At hearing, the County Engineer noted another acceptable alternate crossing at 102nd Street and Pioneer Highway, located less than another half-mile to the north of Dettling Road. See Bloodgood, TR. 136:23 – 137:4.

¹⁴ Exh. No. 17, at 5-6.

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crossing, it pledged to work with Snohomish County to upgrade the 300th Street NW crossing to address any resulting increase in traffic.¹⁵

The closest alternate crossing south of Logen Road is located at 271st Street NW, approximately 1.5 miles to the south. The 271st Street grade crossing is within the City of Stanwood, has three sets of tracks, and experiences much greater traffic volume than either Logen Road or 300th Street NW.¹⁶ Active safety features at the 271st Street NW crossing include flashing light signals, automatic gates, and warning bells; passive safety features include a yellow highway-rail grade crossing advance warning sign, a white "crossbuck" highway-rail grade crossing sign on each side of the tracks also indicating "3 tracks," as well as painted pavement markers in advance of the intersection.¹⁷

III. PETITION FOR REVIEW, MOTION TO REOPEN AND ANSWERS

A. Burlington Northern Petition and Motion.

7 In its petition for review, Burlington Northern requests that the Commission amend the Initial Order to modify the timing in which the railroad must satisfy two of the three conditions to closing the crossing. Specifically, Burlington Northern requests that the Commission direct the railroad to close the crossing before improving road conditions at the 300th Street / Dettling road crossing and before constructing the turnaround cul-de-sac at Logen Road. The railroad does not contest the outcome of the Initial Order, i.e., closure of the crossing, or the timing of the condition relating to improvements to the 271st Street crossing, as the railroad asserts the condition can be met prior to closing the Logen Road crossing.

8 Burlington Northern asserts that the Logen Road crossing closure, upgrading the signals at Dettling Road and constructing the turnaround are individual parts of the overall Stanwood Siding project: Each must be completed before the siding track through Logen Road becomes operational. Burlington Northern offers an e-mail by Burlington Northern Project Engineer Enrique Mondragon concerning the operational issues involved in the project to support its request to modify the conditions in the

¹⁵ Exh. No. 1 (Petition), Section 5, ¶ 1.

¹⁶ See Exh. No. 7, at 4-5 and Figure 2.

¹⁷ Exh. No. 17, at 3-4.

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Initial Order.¹⁸ The railroad requests the Commission reopen the record to admit Mr. Mondragon's e-mail.¹⁹

9 Burlington Northern asserts that it will be reasonably safe to temporarily reroute Logen Road traffic to the Dettling Road crossing with its existing warning devices. The railroad argues that the majority of the traffic from Logen Road will be diverted to the 271st Street crossing in the south, and very little traffic will be rerouted to Dettling Road to the North.²⁰

10 The railroad also argues that the Commission is preempted from preventing or regulating how the railroad and the Washington State Department of Transportation (WSDOT) extend the siding track through Logen Road. Burlington Northern argues that the Interstate Commerce Commission Termination Act (ICCTA) "grants the Surface Transportation Board (STB) exclusive jurisdiction over nearly all matters of railroad regulation."²¹

B. Mr. Logen's Answer

11 In an e-mail dated November 12, 2009, and sent to the administrative law judge, the parties and the Commission's Records Center, Mr. Logen opposes the railroad's petition. Mr. Logen argues that the record shows that the crossings to the north of Logen Road are more dangerous to the public than the Logen Road crossing. Mr. Logen argues that closing the Logen Road crossing prior to improving the other crossings "will have the effect of forcing residents to use more dangerous crossings before there is any need for such closure."²²

¹⁸ Burlington Northern Petition, ¶¶ 3, 12.

¹⁹ *Id.*, ¶ 12-13.

²⁰ *Id.*, ¶¶ 14-17, citing Norris, TR 77:18-78:4, 78:24-79:9.

²¹ *Id.*, ¶ 20.

²² November 12, 2009, e-mail from Lynn Logen to Commission Records Center, Judge Torem and the parties.

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12 Further, Mr. Logen states that he expects "the proposed cul-de-sac on Logen Road to be accessed during construction by using the crossing rather than from the east side where the cul-de-sac will be constructed showing the need to keep this crossing open."²³ Mr. Logen argues that another option is for the railroad to withdraw its request to close the crossing and avoid the construction conflicts.

C. Commission Staff's Answer

13 Commission Staff agrees with the changes that Burlington Northern proposes to the wording of the Initial Order. Staff is convinced that it would be impractical to keep the Logen Road crossing open to through traffic during the construction of the turnaround. If a motorist mistakenly drove down Logen Road during construction intending to go over the crossing, Staff is confident the motorist would be able to turn around at an existing driveway. Staff also agrees that the traffic analysis in the record demonstrates that, of the few motorists who use the Logen Road crossing, most will divert to the 271st Street crossing, and only a small number will use the Dettling Road crossing, or the 102nd Street crossing.²⁴

14 Similarly, Staff does not object to closing the Logen Road crossing prior to making the required improvements at Dettling Road. Staff notes that the primary reason for the improvements to the Dettling Road crossing is the construction of a new siding through the crossing, not to accommodate the additional traffic that may be diverted from Logen Road.²⁵ In response to Mr. Logen's concerns about the safety of the Dettling Road crossing, Staff states that since the installation of lights and gates at the crossing, there have been no accidents.²⁶

15 Finally, Staff argues that Burlington Northern's federal preemption argument is unnecessary and too broad in its implications. Staff asserts that state authority over conditions at railroad grade crossings is a well established carve-out from the ICCTA

²³ *Id.*

²⁴ Commission Staff's Response, ¶¶ 2-3.

²⁵ *Id.*, ¶ 3.

²⁶ *Id.*

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and the Federal Railroad Safety Act.²⁷ Staff argues that there may be circumstances where public safety would require improvements be made before a crossing is closed, such as if closing the crossing would result in substantial traffic being diverted to an adjacent traffic that is not adequate to handle the additional traffic.²⁸ Staff insists the Commission would not be preempted in such a case from requiring improvements to the adjacent crossing prior to closure of a crossing.

16 Staff does not address the railroad's petition to reopen.

IV. DISCUSSION AND DECISION

A. Petition to Reopen the Record

17 We first address Burlington Northern's request to reopen the record to admit an e-mail from its project engineer, Mr. Mondragon. The e-mail, dated November 6, 2009, was sent to Kelsey Endres, the railroad's counsel in this proceeding, after the Initial Order was entered. The e-mail describes the most efficient timing of construction at the Logen Road and Dettling Road crossings. Burlington Northern relies on Mr. Mondragon's statements to support its petition for administrative review.

18 Under the Commission's procedural rules, a party may seek to reopen the record "at any time after the close of the record and before entry of the final order."²⁹ The Commission has discretion to reopen the record "to allow the receipt of evidence that is essential to a decision and that was unavailable and not reasonably discoverable with due diligence at the time of the hearing or for any other good and sufficient cause."³⁰ Under the rule, the Commission will give each party an opportunity to respond to any new evidence, and then enter a final order or return the matter to the administrative law judge for further hearing or other process as appropriate.

²⁷ *Id.*, ¶ 4, citing *Iowa, Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557 (8th Cir. 2004); *Home of Economy v. Burlington Northern*, 694 N.W.2d 840, 846-47 (ND 2005).

²⁸ *Id.*

²⁹ WAC 480-07-830.

³⁰ *Id.*

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19 We are concerned about reopening the record to admit additional evidence that was created after the Initial Order was entered, presumably to support the railroad's concerns about the timing of the recommended conditions. We find that there is sufficient evidence in the record and ambiguity in the Initial Order to justify granting the railroad's petition for review without reopening the record. We deny Burlington Northern's petition to reopen the record as unnecessary to our decision.

B. Petition for Review

20 Burlington Northern agrees with the result of the Initial Order in this proceeding, but requests the Commission change the timing in which it must satisfy certain conditions. The railroad requests the Commission modify the conditions to allow it to close the Logen Road crossing before constructing the turnaround cul-de-sac at the crossing, and before it makes road improvements at the Dettling Road crossing.

21 In reviewing the record, the Initial Order, and the parties' recent pleadings, we find it appropriate to modify the timing of the conditions imposed in the Initial Order.

22 In reviewing the Initial Order, it is not clear why the conditions in paragraph 74, other than improvements to 271st Street NW, must be met prior to closing the Logen Road crossing. The discussion section of the order, at paragraph 53, explains the need to make improvements to the 271st crossing before closure, but does not state the timing of the work the railroad must perform at Dettling Road or the construction of the cul-de-sac. Neither is there any conclusion that the safety benefits of the improvements require that the two conditions be met prior to closure. As Staff states, it would be impractical to keep the Logen Road crossing open while constructing the turnaround. It would be difficult for motorists to maneuver the crossing while construction is underway. We find reasonable the railroad's request to close the crossing before construction of the turnaround.

23 We also find it reasonable to modify the timing of the condition relating to improvements at Dettling Road. The improvements are road upgrades due to the construction of the siding track, not railroad signal upgrades as with 271st Street.³¹ The record reflects a small incremental traffic increase on Dettling Road after the

³¹ Order 03, ¶ 52.

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Logen Road crossing is closed. Contrary to Mr. Logen's arguments, Staff asserts that the crossing is safe - there have been no accidents at the Dettling Road crossing since active warning devices have been installed at the crossing.³² Nothing in record demonstrates that public safety requires the improvements at Dettling Road be made prior to closing the crossing. As with the condition for constructing the turnaround, we find reasonable the railroad's request to close the crossing before completing the work at Dettling Road.

24 Given our decision on the railroad's petition, we find it unnecessary to reach the issue Burlington Northern raises concerning federal preemption.

FINDINGS OF FACT

25 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

- 26 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the placement and conditions of operation of crossings at grade of railroad tracks with public roadways within the State of Washington.
- 27 (2) The Burlington Northern and Santa Fe Railway Company petitioned on January 22, 2009, for authority to close the highway-railway crossing at Logen Road in Snohomish County, Washington.
- 28 (3) The Logen Road at-grade crossing is located to the north of the city limits of Stanwood. On an average day, four Amtrak passenger trains, eight to ten freight trains, and approximately 140 vehicles make use of the crossing.
- 29 (4) The Logen Road crossing is within one-and-one-half miles of a crossing to the south (271st Street NW) and approximately one-half mile of a crossing to the

³² Hunter, TR. 234:13-23; *see also* Exh. Nos. 11, 17 at 5-6, 21 at 7-8.

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north (300th Street NW / Dettling Road). One or both of those crossings provide the general public with suitable alternative access across the tracks with a minimum of inconvenience during normal conditions.

- 30 (5) Closure of the Logen Road crossing will divert a majority of its current traffic southward to 271st Street NW in Stanwood with the remainder diverted northward to 300th Street NW / Dettling Road.
- 31 (6) Burlington Northern has committed to perform warning signal upgrades and updates at the 271st Street NW crossing; road improvements at the Dettling Road crossing, and to build a cul-de-sac at the Logen Road crossing, as a part of the siding project and in conjunction with the closure of Logen Road.

CONCLUSIONS OF LAW

32 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

- 33 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding.
- 34 (2) Closure of the Logen Road crossing will result in inconvenience to some persons who now use the crossing. Mitigating measures, such as upgrading and updating the safety features at the 271st Street NW at-grade crossing, creation of a turnaround cul-de-sac on the easterly approach to the railroad tracks on Logen Road, and certain road improvements to the 300th Street NW crossing, can ameliorate concerns about closure of the Logen Road crossing.
- 35 (3) The public safety benefit of improvements at 271st Street NW crossing demonstrate the improvements should be made prior to closing the Logen Road crossing, and diverting traffic to the 271st crossing.
- 36 (4) While the road improvements at the Dettling Road crossing will improve the safety of the travelling public, the amount of additional traffic diverted after

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closing the Logen Road crossing does not require the improvements be made prior to closing the crossing.

- 37 (5) Construction of a turnaround cul-de-sac at Logen Road would effectively close the crossing to through traffic, requiring the railroad to close the crossing prior to starting construction.

ORDER

THE COMMISSION ORDERS:

- 38 (1) Burlington Northern Santa Fe Railway Company's petition to reopen the record in Docket TR-090121 is denied.
- 39 (2) Burlington Northern Santa Fe Railway Company's petition for administrative review of the Initial Order, Order 03, in Docket TR-090121 is granted.
- 40 (3) The conditions in paragraph 74 of the Initial Order, Order 03 in this proceeding, are modified as follows:

Authority to close the Logen Road crossing is granted upon the following conditions:

- (a) First, BNSF shall upgrade and update the safety features at the 271st Street NW at-grade crossing in Stanwood and, as directed by a diagnostic team, provide proportionate funding for pedestrian safety improvements (i.e., sidewalks). This condition shall be fulfilled prior to the closure of Logen Road.
- (b) Second, BNSF shall work with Snohomish County to improve road conditions at the 300th Street NW / Dettling Road grade crossing. This condition need not be fulfilled prior to closure of the Logen Road crossing, but shall be fulfilled during the siding track extension project.
- (c) Third, BNSF shall work with Snohomish County to construct a turnaround cul-de-sac on the approach to the railroad tracks on Logen Road. This

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condition shall be fulfilled simultaneously with closure of the Logen Road crossing to the extent reasonably possible.

- 41 (4) The Commission retains jurisdiction over the subject matter and the parties to the proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective November 30, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, 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 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

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4 Judge Pearson conducted a public comment hearing for the Commission on the evening
of April 28 in Union Gap. In addition, the Commission accepted written and electronic
public comments on these matters from the date of BNSF's initial filings until April 28,
2015. In sum, the Commission received and considered comments from 17 individuals
and organizations, all of whom oppose the closure of the North Stevens Road crossing
and/or the Barnhart Road crossing.

5 On June 1, 2015, the parties filed simultaneous post-hearing briefs.

6 Bradley Scarp and Michael Chait, Montgomery Scarp MacDougall, PLLC, Seattle,
represent Petitioner BNSF. Quinn Plant, Menke Jackson Beyer, LLP, Yakima, represents
Respondent Yakima County. R. Joseph Sexton, Galanda Broadman, PLLC, Seattle,
represents the Yakama Nation.

BACKGROUND

7 BNSF runs a mainline track east and west through the cities of Toppenish and Mabton in
Yakima County. Numerous roads running north and south cross the BNSF line as it runs
eastbound/westbound, including North Stevens Road and Barnhart Road. Presently, 12 to
14 trains come through both crossings each day at the maximum speed of 49 miles per
hour. Citing its interest in improving public safety by reducing the potential for train-
vehicle crossing accidents, BNSF seeks permission to close both crossings.

8 The North Stevens Road and Barnhart Road crossings are located in a primarily
agricultural area surrounded by open farm fields. To the south, State Route 22 (SR-22)
runs parallel to the BNSF main line. South Track Road runs parallel with the BNSF line
to the north in the vicinity of the North Stevens Road crossing.

9 Barnhart Road is controlled by stop signs and white crossbuck highway-rail grade
crossing signs on both sides of the tracks, and pavement markings on the south side of the
tracks.³ North Stevens Road is controlled by stop signs and white crossbuck highway-rail
grade crossing signs on both sides of the tracks.⁴

pre-filed testimony. The second, which was marked as Exhibit GN-16, was the Basic Accident
Prediction Formula and the calculations supporting the predicted accident rates referenced on
page 8 of Mr. Norris's pre-filed testimony.

³ Norris, Exh. No. GN-5.

⁴ Norris, Exh. No. GN-6.

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- 10 The closest alternate crossings to Barnhart Road are Indian Church Road, approximately 1.4 miles to the northeast, and Satus Longhouse Road, approximately two miles to the southeast. The Indian Church Road crossing is controlled by active warning devices, and the Satus Longhouse Road crossing is controlled by passive devices.⁵
- 11 The closest alternate crossings to North Stevens Road are Meyers Road, approximately 1.4 miles to the northeast, and South Track Road, just over one mile southwest. Both crossings have active warning devices.⁶

EVIDENCE

A. Proponents – BNSF

- 12 BNSF presented testimony and exhibits to illustrate the safety concerns motivating the Company to seek closure of both crossings. The following witnesses testified on behalf of the Company: David Agee, manager of field safety and support for BNSF; Terry Stephens, division trainmaster for BNSF; Michael Tycksen, road foreman of engines and former locomotive engineer for BNSF; Foster Peterson, partner and consultant at Full Service Railroad Consulting, Inc. in Marietta, Georgia; and Gary Norris, project manager and senior traffic engineer at DN Traffic Consultants in Preston, Washington.
- 13 The witnesses testified generally about the inherent danger of at-grade crossings and the risk of collisions at crossings with passive warning devices. Mr. Norris expressed his opinion that all at-grade crossings should be closed, and concluded that the Barnhart Road and North Stevens Road crossings are particularly dangerous because they lack active safety controls.⁷
- 14 In its post-hearing brief, BNSF argues that at-grade crossings present a substantial danger to the public and should be closed absent a strong showing of public necessity and convenience. BNSF characterizes the crossings at issue as “sparsely used by a small handful of agribusinesses” who will be minimally inconvenienced by their closure.⁸ BNSF claims that both crossings have visibility obstructions, and that each of the

⁵ Norris, Exh. No. GN-4.

⁶ *Id.*

⁷ Norris, TR 300:10-11; Norris, Exh. GN-11T at 3:21-24.

⁸ Petitioner's Post-Hearing Brief, at 4:8-9.

alternate crossings is safer by virtue of having active controls. BNSF further argues that any increase in slow-moving farm equipment on SR-22 caused by closing the crossings would be statistically insignificant. Finally, BNSF argues that Respondents Yakima County and Yakama Nation have failed to present evidence demonstrating a public need so great that the crossings must be kept open despite their “uniquely dangerous” conditions.⁹

B. Opponents – Yakima County and the Yakama Nation

- 15 **Yakima County.** Yakima County presented testimony from the following witnesses: Kent McHenry, transportation engineering manager for Yakima County Public Services; Ed Boob, field consultant for Husch and Husch Fertilizer and Chemicals; Andy Curfman, manager for T & K Farms; Curtis Parrish, co-owner of S & P Farms and Ranch; Allen Zecchino, owner of Zecchino Farms; Dave Trautman, crop advisor with Simplot Soilbuilders; and John Hood, senior engineering technician with the Yakima County Department of Public Services. All were opposed to closing the crossings on the grounds that diverted traffic – and slow moving, oversized farm equipment in particular – would increase safety risks on S-22 and South Track Road.
- 16 Several witnesses testified that closing either crossing would require substantial rerouting of heavy farm equipment along SR-22 and county roads during planting and harvesting seasons, as well as rerouting semi-trucks and other vehicles involved in daily farming operations.
- 17 In its post-hearing brief, Yakima County argues that BNSF failed to meet its burden of proving, by a preponderance of the evidence, that public safety requires closure of either crossing. Contrary to BNSF’s assertion, Yakima County claims that visibility is excellent at both crossings, and both crossings are substantially safer than each of their nearest alternatives. Yakima County also argues that both crossings are used extensively by area farmers who would otherwise be required to reroute oversized farm equipment onto SR-22 and South Track Road, which would impede traffic traveling in both directions and may, as the Washington Department of Transportation (WSDOT) posits, increase the risk of collisions.¹⁰
- 18 Finally, Yakima County notes that petitions for closure usually arise in the context of a proposed track modification that renders a crossing “particularly dangerous,” “especially

⁹ *Id.*, at 4:6.

¹⁰ See McHenry, Exh. No. KM-10.

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dangerous,” or “especially hazardous,” which is not present here. Instead, the alternate crossings to which vehicles would be rerouted each have features that the Commission has deemed “especially dangerous.”¹¹

- 19 **Yakama Nation.** Yakama Nation offered testimony from the following witnesses: Al Pinkham, engineering planner for the Yakama Nation Engineering Program; Roy Dick, Elder at the Satus Longhouse; and Johnson Meninick, Elder of the Yakama Nation and program manager of the Yakama Nation Cultural Resources Program. All were opposed to closing the Barnhart Road crossing, which is part of a traditional route that Satus Longhouse members and others use for funeral processions and to access the Satus Longhouse. All were similarly opposed to closing the North Stevens Road crossing because doing so will pose an increased risk to drivers traveling on or through the Yakama reservation.
- 20 In its post-hearing brief, Yakama Nation argues that BNSF has failed to satisfy its burden of proof in its petitions for the closure of either crossing, and both Yakima County and Yakama Nation have advanced significant evidence that, on balance, weighs heavily in favor of keeping the crossings open. Yakama Nation requests the Commission consider not only the risks associated with the crossings themselves, but also the corresponding risks that will arise if the crossings are closed, including the diversion of traffic onto state highways and county roads. Ultimately, Yakama Nation claims, the public interest and safety is best served if the crossings remain open.
- 21 Like Yakima County, Yakama Nation notes that both North Stevens Road and Barnhart Road cross the railroad tracks at a nearly 90 degree angle, and both crossings have excellent visibility. Finally, Yakama Nation argues, even if the Commission finds that BNSF has met its burden by establishing that closure of these crossings is required for public safety reasons, the need for the crossings is so great that the crossings should remain open.

C. Public Comment

- 22 One member of the public, Frank Lyall of the Yakima County Farm Bureau, spoke against closure of the Barnhart Road and North Stevens Road crossings at the public comment hearing on April 28, 2015. Mr. Lyall expressed concerns about closure of the crossings diverting heavy machinery onto the highway, which he believes increases the danger both to farmers and to the public generally.

¹¹ Respondent Yakima County's Post-Hearing Brief, at 26-28.

- 23 The Commission also received 16 written comments from individuals opposed to the closures, most of whom appeared as witnesses for Yakima County and the Yakama Nation. Philip Sealock submitted comments opposing the closing of the North Stevens Road crossing because he uses it regularly for farming on both sides of the tracks. Dean Oswalt submitted comments opposing the closing of the North Stevens Road crossing because he uses the crossing on a daily basis in his farming operations. Craig Oswalt also submitted comments opposing the closure of the North Stevens Road crossing because he uses it frequently.

DISCUSSION AND DECISION

- 24 RCW 81.53.060 allows railroad companies to file written petitions with the Commission seeking the “closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing” when the petitioner alleges that the public safety requires such action. As the petitioner in this matter, BNSF carries the burden of proving, by a preponderance of the evidence, that public safety requires closure of the Barnhart Road and North Stevens Road crossings.¹²
- 25 Although past Commission orders took varied approaches to evaluating petitions for closure, a synthesis of our decisions produces a comprehensive analysis that begins with a two-part inquiry. First, we examine whether a crossing is “especially hazardous”¹³ such that public safety requires it to be closed.¹⁴ If the answer is affirmative, we next determine whether the public need for the crossing is “so great that the crossing should be kept open notwithstanding its dangerous condition.”¹⁵
- 26 In *Burlington Northern RR Co. v. Skagit County*, the Commission held that any number of the following factors may make a crossing especially hazardous: 1) the presence of

¹² *BNSF Railway Company v. Snohomish County*, Docket TR-090121, Order 03 ¶ 42 (October 21, 2009).

¹³ The terms “especially hazardous” (see *BNSF v. City of Sprague*, Docket TR-010684, ¶ 53), “particularly dangerous” (see *BNSF v. Skagit County*, Docket TR-940282, pg. 4), and “exceptionally hazardous” (see *BNSF v. City of Mount Vernon*, Docket TR-070696, Order 06 ¶ 60 and ¶ 71) have been used by the Commission interchangeably. For ease of reference, we use “especially hazardous” in our analysis here.

¹⁴ *Department of Transportation v. Snohomish County*, 35 Wn. 2d 247, 254 (1949) (hereinafter, *Snohomish*).

¹⁵ *Id.*

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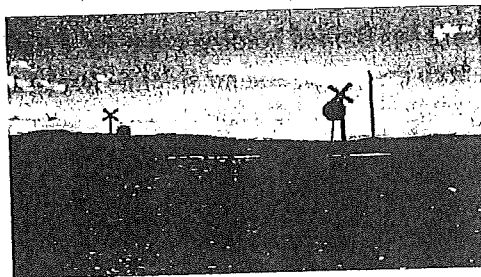
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vegetation or other obstacles that limit visibility on the approach; 2) the roadway crosses the crossing at an oblique angle (other than 90 degrees); 3) limited holding capacity on approaches between the railroad right of way and the streets that intersect; 4) more than one mainline track at the crossing; and 5) the presence of siding track in addition to mainline track.¹⁶

27 If the Commission finds that a crossing is especially hazardous, we consider the following factors, as enumerated in *BNSF Railway Company v. Snohomish County*, to determine whether the crossing should remain open despite its dangerous condition: 1) the amount and character of travel on the railroad and on the highway, 2) the availability of alternate crossings, 3) the number of people affected by the closure, 4) whether there are readily available alternate crossings in close proximity that can handle any additional traffic resulting from the closure, and 5) whether the alternative crossings are safer than the crossing proposed for closure.¹⁷

28 If, however, the evidence fails to show that a crossing is especially hazardous, the Commission need only decide whether the inherent danger of the crossing, balanced with public convenience and necessity, warrants its closure.¹⁸

29 **The Barnhart Road and North Stevens Road Crossings are not Especially Hazardous.** The factors enumerated in *Skagit County* are not present here at either crossing. First, Exhibit No. KM-3 shows unimpeded visibility at the North Stevens Road



¹⁶ *Burlington Northern RR Co. v. Skagit County*, Docket TR-940282, Order 01 at 4 (December 13, 1996).

¹⁷ *BNSF Railway Company v. Snohomish County*, Docket TR-090121, Order 03 ¶ 49 (October 21, 2009). See also *BNSF v. City of Ferndale*, Docket TR-940330, Final Order (March 31, 1995); *BNSF v. Skagit County*, Docket TR-940282, Final Order (December 13, 1996); and *Union Pacific Railroad v. Spokane County*, Docket TR-950177, Final Order (July 3, 1996).

¹⁸ *Burlington Northern and Santa Fe Railway Company v. City of Sprague*, Docket TR-010684, Third Supplemental Order at ¶ 40 (October 21, 2002).

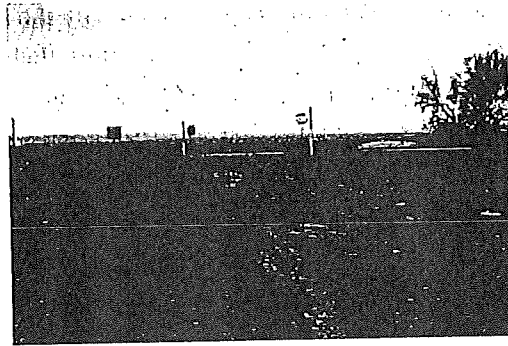
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crossing in both directions. The photo below, taken from BNSF's post-hearing brief, depicts very minimal vegetation along one side of the tracks:

30 Judge Pearson observed during the April 27, 2015, site visit that the North Stevens Road crossing has better visibility than either of its alternate crossings.

31 Similarly, Exhibit No. KM-2 shows unimpeded visibility at the Barnhart Road crossing in both directions. The photo below, taken from BNSF's post-hearing brief, also depicts only a few trees along one side of the tracks:



Judge Pearson observed during the April 27, 2015, site visit that the Barnhart Road crossing has better visibility than either of its alternate crossings.

32 Second, the roadway crosses the tracks at a nearly 90 degree angle at both crossings. Third, neither crossing has limited holding capacity. Finally, only one set of mainline tracks is present at both crossings, and no sideline tracks are present.¹⁹ Accordingly, we find that neither crossing is especially hazardous.

33 **The Barnhart Road and North Stevens Road Crossings are also not "Uniquely Dangerous."** In its post-hearing brief, BNSF largely ignores those factors the

¹⁹ BNSF relies on the Commission's analysis in *Burlington Northern Railroad Company v. City of Ferndale* to support its theory that the inherent danger of at-grade crossings is sufficient to warrant closure absent a strong showing of public necessity. But the facts in *Ferndale* are distinguishable from the facts here. We began our analysis in *Ferndale* with the premise that at-grade crossings are inherently dangerous, but went on to find that the crossing at issue was "especially hazardous" for three reasons: 1) the addition of siding increased use as a passing track, 2) new switching activity would occur over the crossing, and 3) two new passenger trains traveling at a rate of 79 mph were being added to the tracks. See *Burlington Northern Railroad Company v. City of Ferndale*, Docket TR-940330, Initial Order at 3-4 (November 18, 1994).

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Commission considers “especially hazardous,” arguing instead that other factors make both crossings “uniquely dangerous.” The Commission has not previously recognized the concept of “uniquely dangerous” or used most of the factors the Company proposes to determine whether a crossing should be closed. We decline to do so now. Even if we considered the Company’s factors, however, we would not reach a different conclusion.

34 BNSF argues the crossings are “uniquely dangerous” because, *inter alia*, they are unpaved, frequently used by heavy farm equipment, and controlled by passive warning devices. While the north side of the Barnhart crossing and both sides of the North Stevens crossing are unpaved, this feature does not qualify either crossing as “uniquely dangerous,” as BNSF claims; numerous unpaved public crossings presently exist throughout Washington.

35 Similarly, neither crossing is “uniquely dangerous” due to frequent use by heavy farm equipment. There are many crossings that are utilized by a high volume of farm equipment, particularly in agricultural areas throughout Eastern Washington.

36 Moreover, if heavy farm equipment poses a risk at the North Stevens and Barnhart crossings, it poses the same risk at each of the alternate crossings. The record clearly demonstrates that regardless of whether the crossings remain open, farm equipment will continue to cross the tracks with the same frequency.

37 Finally, the fact that both crossings have passive safety controls does not make them “uniquely dangerous.” Of the more than 2,200 at-grade crossings in Washington, 54 percent are controlled by passive warning devices.²⁰ The crossings at North Stevens and Barnhart Roads are hardly unique in this respect. However, to address BNSF’s concerns about the lack of active warning devices, the Company may wish to assemble a diagnostic team to determine whether additional safety controls would be appropriate at either crossing.²¹

²⁰ See the Washington Utilities and Transportation Commission Inventory of Public Crossings, available at <http://www.utc.wa.gov/regulatedIndustries/transportation/rail/Pages/CrossingInventory.aspx> (July 2015).

²¹ WSDOT sets forth specific criteria for signalization of at-grade crossings. According to WSDOT, “[a]ctive protection may be appropriate for those locations which have an exposure factor (trains per day times vehicle average daily traffic, or ADT) greater than 1,500 or are located on railroad main lines. However, a site specific evaluation of train and vehicle traffic volumes and speeds, rural or urban location, potential danger to a larger number of people, sight distance and accident history should be completed before making a decision.” (Washington State Department of Transportation Local Agency Guidelines, at Section 32.2 (June 2015)). Here,

38 Because BNSF has not met its burden of proving that either crossing is especially hazardous, we need not undertake the analysis set forth in *BNSF Railway Company v. Snohomish County* to determine whether the public need is “so great” that the crossings must remain open. Rather, the appropriate standard here is whether the inherent danger of the crossings, balanced with public convenience and necessity, warrants closure of either crossing.²² A review of Commission decisions that apply this standard reveals that our jurisprudence is relatively undeveloped in this area.

39 In *Burlington Northern and Santa Fe Railway Company v. City of Sprague*, the administrative law judge²³ denied petitions for closure of two at-grade crossings because the petitioner failed to show that the crossings were particularly dangerous, that there were adequate alternative routes, or that closing either crossing would serve public convenience and necessity.²⁴ Using *Sprague* as a guidepost, our analysis will consist of a comprehensive examination of both public safety – including consideration of the potential safety impact that closing the crossings would have on the surrounding community – and public convenience and necessity, which necessarily includes an inquiry into the adequacy of alternate crossings.

40 **Safety Impact of Crossing Closures on the Surrounding Community.** Both Yakima County and Yakama Nation argue persuasively that closing either crossing would decrease safety in the surrounding community by introducing slow-moving farm equipment onto SR-22. For example, Mr. Curfman testified that the 70 trips his company makes across the North Stevens crossing each week between his two parcels would require an additional ten miles of travel; his 40-foot semi-trucks cannot make the turns required to navigate county roads.²⁵ If the North Stevens crossing is closed, each of those semi-trucks, in addition to tractors that travel at a maximum speed of 18 miles per hour,

neither crossing meets the exposure factor threshold of 1,500. (Using the exposure factor formula of ADT multiplied by the number of trains per day, Barnhart Road has an exposure factor of 1,008. North Stevens Road has an exposure factor of 546.) The crossings, are, however, located on BNSF’s main line. Accordingly, it appears both crossings may benefit from WSDOT’s recommended “site specific evaluation,” commonly referred to as a diagnostic review.

²² *Burlington Northern and Santa Fe Railway Company v. City of Sprague*, Docket TR-010684, Third Supplemental Order ¶ 40 (October 21, 2002).

²³ In *Burlington Northern and Santa Fe Railway Company v. City of Sprague*, the administrative law judge’s initial order was upheld by the Lincoln County Superior Court on appeal.

²⁴ *Burlington Northern and Santa Fe Railway Company v. City of Sprague*, Docket TR-010684, ¶ 39.

²⁵ Curfman, TR 99:14-20.

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would enter SR-22 into traffic without the benefit of a stop light, and would not reach safe highway traveling speed before arriving at an alternate crossing. In addition, SR-22 contains no acceleration lanes to accommodate the ingress and acceleration of semi-trucks or heavy farm equipment. Each of Yakima County's witnesses echoed Mr. Curfman's concerns.

41 WSDOT expressed the same concerns in a March 12, 2015, letter to Mr. McHenry:

"If the N. Stevens Road and Barnhart Road crossings are closed, there are no alternate routes on the local system to accommodate farm vehicle traffic. In the absence of alternative routes, WSDOT expects an increase in the number and trip duration of farm vehicles on SR-22 ... SR-22 has a speed limit of 60 miles per hour. Introducing slower farm vehicles with the high speed of highway traffic of SR-22 will create operational concerns and would likely increase the risk of collisions."²⁶

42 BNSF, however, failed to undertake any meaningful analysis of the public safety impact that closing either crossing would have on the surrounding community. On cross examination, Mr. Norris admitted that he performed no analysis of the increased risk of collisions along SR-22 caused by diverting passenger vehicles and farm equipment.²⁷ Mr. Peterson similarly testified that he did not consider the potential adverse impacts of closing the crossings, nor was he asked to.²⁸ As Yakima County correctly noted in its post-hearing brief, "unless and until these [safety] impacts can be quantified and weighed against the purported safety benefits of closing these crossings, the net safety impact of closing the crossings cannot be determined."²⁹

43 Although BNSF claims that the risk of collisions at both crossings is too great to allow either crossing to remain open, the Company's expert witness failed to properly calculate the probability of a vehicle-train collision. Mr. Norris used the US Department of Transportation (USDOT) Accident Prediction Model for the North Stevens Road and Barnhart Road crossings, which requires producing, and then combining, three independent calculations. Mr. Norris testified that he completed only the first calculation, identified by USDOT as the basic formula, and neither completed the two subsequent

²⁶ McHenry, Exh. No. KM-10.

²⁷ *Id.*, at 282:4-7.

²⁸ Peterson, TR 202:11 – 203:10.

²⁹ Respondent Yakima County's Post-Hearing Brief, ¶ 64.

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calculations nor combined all three to produce an accurate result.³⁰ Accordingly, BNSF failed to meet its burden to prove that the inherent danger of either crossing – which logically includes the risk of collision at the crossings – outweighs the public safety risks that will result if the crossings are closed.

44 **Public Convenience and Necessity.** In its post-hearing brief, BNSF argues unpersuasively that closing both crossings would create a “minimal inconvenience” for the parties who presently use them.³¹ The testimony established that the inconvenience created by closing either crossing would be substantial.

45 For example, S & P Farms owns and farms two 80-acre parcels that are bisected by the BNSF main line near the North Stevens crossing. S & P Farms uses the crossing to move large farm equipment between the two parcels, which eliminates the need to use SR-22. If the North Stevens crossing were closed, harvesting corn would require a “caravan of large, slow moving farm equipment (combine, grain cart, tractor with stalk beater, and semi-trucks) to travel more than a mile on SR-22 each time we need to cross the BNSF line.”³²

46 T & K Farms also farms parcels of land on both sides of the BNSF mainline; the North Stevens crossing allows semi-trucks and trailers to move between the two parcels, similarly eliminating the need to use SR-22. Mr. Curfman testified that much of the company’s equipment travels at speeds below 25 mph, which would increase travel time between the two parcels from less than five minutes to more than 30 minutes. According to Mr. Curfman, this would increase labor and mechanical expenses for T & K, block traffic across SR-22 on narrow portions of the highway, and present a safety hazard to company equipment, employees, and other drivers.³³

47 Mr. Zecchino testified that Zecchino Farms currently moves farm equipment between its two parcels of farming land, which are bisected by the BNSF mainline, by using the crossing at Barnhart Road. If the Barnhart crossing is closed, Zecchino farms would be required to transport its farm equipment two miles along SR-22 to the Satus Longhouse Road crossing each time it moved equipment or other vehicles between the two parcels.³⁴

³⁰ Norris, TR 303:20-25.

³¹ Petitioner’s Post-Hearing Brief, at 4:9-10.

³² Parrish, Exh. No. CP-1T, at 3:12-15.

³³ Curfman, Exh. No. AC-1T, at 4:3-38; 5:23-29.

³⁴ Zecchino, Exh. No. AZ-1T, at 2:25 – 3:3.

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- 48 The record demonstrates that closure of either crossing would not just create a minor inconvenience, such as having to drive a few extra minutes to commute to and from work, or access a business. Each crossing is integral to daily farming activities, and provides the safest means to perform the work, both for farmers and for the traveling public.
- 49 In addition to the farmers and suppliers who use the crossings in the course of conducting business, members of the Yakama Nation also use the Barnhart Road crossing to access the Satus Longhouse. Barnhart Road near the crossing predates the railroad tracks as a trail used by members of the Yakama Nation. The testimony in the record established that the Barnhart Road crossing is part of a traditional route the Satus Longhouse community uses to access the longhouse and the tribal cemetery. Yakama Nation witness Johnson Meninick explained that the Barnhart Road crossing is culturally significant to tribal members because the road was used by tribal elders, and “within our belief we have to follow the pattern that our elders have used, so we’ve always followed that pattern [across the Barnhart Road crossing] because it is our belief.”³⁵
- 50 In its post-hearing brief, BNSF notes that funeral processions have “at times used alternative routes, such as over the Indian Church Road crossing.”³⁶ While it is true that the testimony established that some funeral processions use a route along Indian Church Road, the testimony also established that the procession route is determined by the path of the decedent’s ancestors.³⁷ This is not merely a matter of rerouting, as BNSF suggests.
- 51 Both Yakima County and the Yakama Nation have demonstrated that there is a significant public need for both crossings, and that closing either crossing would negatively impact public safety. Moreover, closing the Barnhart Road crossing would effectively destroy the Yakama Nation’s long-standing cultural tradition.

³⁵ Meninick, TR 247:20-22.

³⁶ Petitioner’s Post-Hearing Brief, at 20:23 – 21:1.

³⁷ In its post-hearing brief, BNSF argues that the Commission’s consideration of the importance of the Yakama Nation’s traditional route over Barnhart Road is beyond the proper scope of the Commission’s analysis. BNSF relies on our decisions in *BNSF Railway Company v. Snohomish County* and *BNSF Rail Co. v. Mt. Vernon*, which conclude that the potential for economic damage to property falls outside the Commission’s purview. Conjectural economic damage to property, however, is in no way analogous to the Yakama Nation’s cultural traditions, which constitute a real and present transportation need that falls squarely within the scope of our analysis.

- 52 **Adequacy of Alternate Crossings.** We also find unconvincing BNSF's argument that each of the alternate crossings is safer than the North Stevens or Barnhart crossings. In its post-hearing brief, the Company argues that the testimony "clearly established" that the Meyers and South Track Road crossings are both "substantially safer" than the North Stevens Road crossing.³⁸ The testimony offered by BNSF witnesses, however, established only that both crossings are controlled by active warning devices, and that both roads are paved.
- 53 In contrast, the evidence offered by Yakima County and the Yakama Nation established that factors other than warning devices make both alternate crossings more dangerous than the crossing at North Stevens Road. First, as Yakima County notes in its post-hearing brief, Mr. McHenry's testimony and its accompanying exhibits demonstrate that the South Track Road crossing occurs at an oblique angle in the middle of an "S" curve, which impairs visibility in both directions.³⁹ Moreover, testimony established that South Track Road is narrow, and is known for high speed traffic. Several witnesses testified that they avoid using South Track Road with farm equipment for those reasons.⁴⁰
- 54 Second, the crossing at Meyers Road crosses the tracks at an oblique angle, and crosses two sets of tracks rather than one. This is problematic because a train stopped on one set of tracks may obscure visibility of the approach of a second train on the other set of tracks.
- 55 BNSF also argues that the testimony "clearly established that the Indian Church Road crossing was substantially safer" and "the Satus Longhouse Road crossing was marginally safer" than the Barnhart Road crossing.⁴¹ Again, the testimony offered by BNSF witnesses established only that the Indian Church Road crossing is controlled by active warning devices, and that both crossings are located on paved roads.
- 56 The Satus Longhouse Road crossing is controlled by passive safety devices (crossbuck and stop signs) and pavement markings. Exhibit No. KM-4 clearly shows that visibility is impeded on the northern approach to the west by trees and brush, which can be removed to improve visibility, and at closer distance by an abandoned building, which cannot be

³⁸ Petitioner's Post-Hearing Brief, at 13:3-5.

³⁹ McHenry, Exh. No. KM-1T, at 4:16-23.

⁴⁰ Curfman, TR 103:17-20; Parrish, TR 109:24 - 110:1.

⁴¹ Petitioner's Post-Hearing Brief, at 21:9-11.

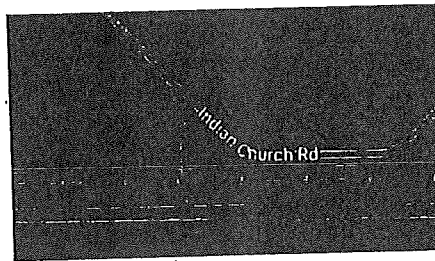
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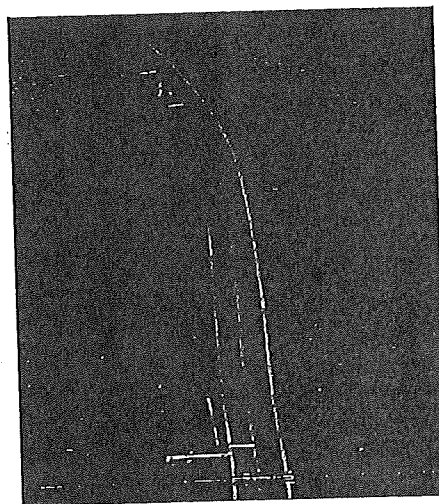
removed. The evidence demonstrates that visibility is more compromised at the Satus Longhouse Road crossing than it is at the Barnhart Road crossing.

57 The evidence also showed that the Indian Church Road crossing is not a viable alternate crossing for many types of vehicles, including farm equipment and semi-trucks, because of the sharp, narrow turn required to access Indian Church Road to the south.⁴² The photos below – taken from both an aerial and street view, respectively – depict the nearly 135-degree right turn that vehicles must negotiate to travel on Indian Church Road back toward the Barnhart Road crossing:

Indian Church Road Crossing, Aerial View



Indian Church Road Crossing, Street View



⁴² Boob, TR 75:2-7; Curfman TR 93:21-94:7; Pinkham TR 233:2-10.

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The evidence also shows that the northern approach to the crossing at Indian Church Road negotiates a curve that degrades visibility of the tracks, particularly to the west.

58 Accordingly, the more viable alternate crossing to Barnhart Road for large farm equipment and semi-trucks is Satus Longhouse Road, which is controlled by passive warning devices similar to those at Barnhart Road. Although BNSF attempts to characterize the Satus Longhouse Road crossing as "marginally safer than the Barnhart Road Crossing," the evidence clearly established that, because of degraded visibility at the Satus Longhouse crossing, the inverse is true.

59 **Decision.** On balance, the evidence in the record weighs heavily in favor of keeping both the North Stevens Road and Barnhart Road crossings open. Yakima County presented extensive testimony regarding the use of both crossings in the course of day-to-day business for local farmers, several of whom farm on noncontiguous parcels of land bisected by the BNSF mainline track. The evidence demonstrated a public need for the crossings, as well as a much more convenient and efficient way for farmers to access their land.

60 The Yakama Nation presented testimony about the tribal need for the Barnhart crossing, which is part of a culturally significant and traditional route that the Satus Longhouse community uses to access the longhouse and the cemetery. This is also a real and demonstrated public need for the Barnhart crossing to remain open. Accordingly, we find that BNSF failed to prove that the inherent danger of either crossing outweighs the demonstrated public need for it to remain open, and we deny both petitions for closure.

FINDINGS AND CONCLUSIONS

- 61 (1) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the placement and conditions of operation of crossings at grade of railroad tracks with public roadways within the State of Washington.
- 62 (2) The Commission has jurisdiction over the subject matter of and the parties to this proceeding.
- 63 (3) BNSF petitioned the Commission on March 10, 2014, for authority to close the highway-railway crossings at North Stevens Road and Barnhart Road in Yakima County, Washington.

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- 64 (4) The North Stevens Road and Barnhart Road at-grade crossings are located in a primarily agricultural area, surrounded by open farm fields. To the south, State Route 22 runs parallel to the BNSF main line.
- 65 (5) Both crossings are used primarily by heavy farm equipment and other commercial vehicles, many of which avoid travel on State Route 22 entirely by using the crossings to access noncontiguous parcels of farm land.
- 66 (6) Both crossings have excellent visibility at the point of crossing and superior visibility on either approach, as compared to adjacent crossings. Both crossings cross one set of tracks at a nearly 90 degree angle, and neither has limited holding capacity.
- 67 (7) BNSF did not meet its burden to prove, by a preponderance of the evidence, that either the North Stevens Road or Barnhart Road crossings are especially hazardous.
- 68 (8) The North Stevens Road at-grade crossing is within 1.4 miles of a crossing to the north (Meyers Road) and approximately one mile of a crossing to the south (South Track Road). Neither of those crossings provide the primary users of the North Stevens Road at-grade crossing – heavy, slow-moving farm equipment – more convenient or safer access across the tracks.
- 69 (9) The Barnhart Road at-grade crossing is within 1.4 miles of a crossing to the north (Indian Church Road). To access Indian Church road to the west and travel back towards Barnhart road, vehicles must negotiate a nearly 135-degree angle turn on a narrow road. For practical purposes, the Indian Church Road at-grade crossing is not a viable alternative crossing for the primary users of the Barnhart Road at-grade crossing – heavy, slow-moving farm equipment.
- 70 (10) The Barnhart Road at-grade crossing is within approximately two miles of a crossing to the south, Satus Longhouse Road. The Satus Longhouse Road at-grade crossing does not provide the primary users of the Barnhart Road at-grade crossing – heavy, slow-moving farm equipment – more convenient or safer access across the tracks.
- 71 (11) Members of the Yakama Nation use the Barnhart Road crossing to access the Satus Longhouse and as a traditional funeral procession route, and closing the Barnhart Road crossing would effectively destroy a tribal tradition. The Yakama Nation's use of the Barnhart Road crossing is a public necessity.

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- 72 (12) BNSF failed to prove, by a preponderance of the evidence, that the inherent risk associated with at-grade crossings outweighs the public convenience and necessity as it relates to either crossing.
- 73 (13) The public convenience and necessity require that the North Stevens Road and Barnhart Road crossings remain open. The Commission should deny BNSF's petitions to close the North Stevens Road crossing and the Barnhart Road crossing.

ORDER

THE COMMISSION ORDERS:

- 74 (1) BNSF Railway Company's petition to close the Barnhart Road at-grade highway rail crossing is DENIED.
- 75 (2) BNSF Railway Company's petition to close the North Stevens Road at-grade highway rail crossing is DENIED.

Dated at Olympia, Washington, and effective August 18, 2015.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RAYNE PEARSON
Administrative Law Judge

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NOTICE TO THE PARTIES

This is an initial order. The action proposed in this initial order is not yet effective. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this initial order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has 20 days after the entry of this initial order to file a petition for administrative review (Petition). Section (3) of the rule identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-825(4) states that any party may file an answer (Answer) to a Petition within 10 days after service of the petition.

WAC 480-07-830 provides that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will not accept answers to a petition to reopen unless the Commission requests answers by written notice.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

You must serve on each party of record one copy of any Petition or Answer filed with the Commission, including proof of service as required by WAC 480-07-150(8) and (9). To file a Petition or Answer with the Commission, you must file an original and three copies of your petition or answer by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250