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6 BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION
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8 BNSF RAILWAY COMPANY,)

9 Petitioner,)

10 vs.)

11 CITY OF MOUNT VERNON,)

12 Respondent,)

13 SKAGIT COUNTY, WASHINGTON STATE)
14 DEPARTMENT OF TRANSPORTATION, and)
15 WEST VALLEY FARMS, LLC,)

16 Intervenor)
17

DOCKET NO. TR-070696

PETITIONER **BNSF'S REPLY** TO
RESPONSES BY SKAGIT COUNTY,
CITY OF MT. VERNON, AND WEST
VALLEY FARMS, LLC TO BNSF'S
MOTION TO LIMIT THE SCOPE OF
THE SUBJECT MATTER BEFORE
COMMISSION

18 **DISCUSSION**

19 *I* Petitioner BNSF Railway Company ("BNSF") brought this motion requesting that the
20 Commission limit the scope of the subject matter to those matters dealing directly with the public
21 safety. The parties do not appear to dispute that the scope of that analysis should include a
22 determination of whether the public need for the crossing outweighs the safety hazards created
23 by the crossing. *See Burlington Northern Railroad Company v. City of Ferndale*, Docket No.
24 TR-940330 (March, 1995). The Washington Supreme Court articulated that balance as follows:

25 Having found that the grade crossing herein is dangerous and unsafe,
26 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.

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

1 2 The Responses submitted separately by the City of Mount Vernon, Skagit County, and
2 West Farms, LLC (“Respondents”) offer various arguments why the scope of the
3 Commission’s review should be expanded, however, none of those issues present
4 extraordinary circumstances that would require the Commission to go outside the scope of
5 railroad grade crossing closure hearings. Moreover, there is no viable reason why the *relevant*
6 factors raised in the Respondents’ briefs cannot be properly addressed under the public safety
7 analysis.

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9 I. Impropriety Of Request For New SEPA Determination Was Fully Briefed In
10 Response To Motion By Mount Vernon.

11 3 WSDOT and BNSF’s *Joint Response In Opposition to the City’s Pre-Hearing Motion*
12 *In Limine and Motion For Summery Judgment Requiring New SEPA Determination By The*
13 *WUTC* sets forth a thorough explanation of why the request for a new SEPA determination is
14 not within the WUTC’s jurisdiction in this matter and should not be part of the Commission’s
15 review or analysis relating to the petition to close the at-grade rail crossing at Hickox Road.
16 Accordingly, BNSF will not restate those arguments here but asks instead that the *Joint*
17 *Response In Opposition* and analysis contained therein be incorporated by reference as part of
18 this Reply brief.

19 4 Mount Vernon’s brief, specifically sections 28-33, does not accurately reflect the law
20 with regard to preemption and serves primarily to muddy the waters on that issue. BNSF does
21 not contend here that STB preemption applies to jurisdiction over “grade crossings” as Mount
22 Vernon argues. The issue of preemption is raised within the narrow confines of whether local
23 *environmental* review is preempted. That determination was made explicit in the *City of*
24 *Auburn v. United States*, 154 F.3rd 1025 (9th Cir. 1998).

25 5 The applicability of RCW 43.21C.030, as suggested by the Boon Intervenors/West
26 Valley Farms, LLC, does not change or affect the analysis of the environmental (SEPA) issue
27 here. First, West Valley is attempting to superimpose an incredibly broad policy statement

1 over a well-defined body of law regarding environmental review under SEPA. It is a
2 fundamental tenet of law that the specific provision governs over a general one, however, they
3 seek the opposite result here. Second, because of the breadth of the environmental policy
4 statement, it is simply too vague and overbroad to have any specific application here. Third,
5 West Valley did not provide any authority for their argument, and neither did they offer any
6 suggestion as to how those two subparts, 030(a) and (e) of the general policy statement should
7 be applied here. And finally, it is moot for West Valley to ask rhetorically if the WUTC is
8 violating SEPA. The WUTC does not have jurisdiction here to conduct review under SEPA.
9 BNSF respectfully submits that RCW 43.21C.030 is a broad policy statement that has no
10 independent application here.

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12 II. Other Arguments Address the Merits of the Petition For Closure of Crossing.

13 6 West Valley states that “the crossing is within the Skagit River floodplain” and that
14 “flooding risk imposes special considerations for maintaining the surface transportation grid
15 and emergency response routes . . .” It is undisputed that the crossing is within the floodplain,
16 however, the statement argues the merits of the petition to close the crossing, rather than
17 address the scope of the WUTC’s review. And as set forth above, those issues can be
18 adequately addressed within the “public safety” factors and analysis.¹

19 7 The Skagit County brief argues that “the present public use and need requires that the
20 crossing remain open,” yet that unsupported statement goes to the substantive heart of the
21 opposition to the petition for closure of the crossing, and not the scope of review.

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23 III. BNSF Seeks to Restrict Mount Vernon’s Back Door Attempt to Broaden
24 WUTC Review to Include Growth Management Act (GMA) Analysis.

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27 ¹ The Skagit County brief also addresses the “public safety” factors of fire and police control and “flood control.” (Page 3). BNSF agrees that flood risk issues, including evacuation routes, fall within public safety factors.

1 7 Tellingly, Mount Vernon's Response brief completely omits any mention of, let alone
2 comment on, the reasoning set forth by the Commission in *See Burlington Northern Railroad*
3 *Company v. City of Ferndale*, Docket No. TR-940330 (March, 1995). *See BNSF's Motion To*
4 *Limit Scope of the Subject Matter Before The Commission*, p.6. The lack of response by
5 Mount Vernon is noteworthy because the *Ferndale* case analyzed the same issues as here and
6 squarely rejected future public convenience as part of the Commission's analysis.

7 8 Mount Vernon instead relies on *Northern Pac. Ry. Co. v. Department of Public Works*,
8 144 Wash. 47, 256 P. 333 (1927) for the broad proposition that the WUTC should consider
9 the public convenience and necessity as that relates to future development. (Response brief,
10 p. 6). However, despite the broad language which Mount Vernon finds favorable, the court in
11 *Northern Pac. Ry.* found that there was:

12 abundant evidence of increased activities in that section on
13 account of the proposed improvement, . . .

14 144 Wash. 53. In other words, there was "substantial testimony" regarding the (currently)
15 ongoing activities relating to the development. That the activities or development itself were
16 not complete at that time and the future increased public use not yet in effect did not and does
17 not mean that broad based policy considerations - without substantial testimony regarding
18 current activities - can be put before the WUTC to alter the scope of review sought here.

19 9 Mount Vernon uses *Northern Pac. Ry.* as a back door attempt to bring the broad
20 Growth Management Act analysis before the Commission. BNSF does not dispute that the
21 WUTC's analysis may include consideration of testimony regarding ongoing use and
22 development insofar as that development will impact future use. However, Mount Vernon
23 seeks a much broader scope of review - based on its argument that the GMA policy should be
24 part of the WUTC's analysis - which is not countenanced by the holding in *Northern Pac. Ry.*
25 The Commission's decision in *Burlington Northern Railroad Company v. City of Ferndale*,
26 *supra*, provides a more comprehensive analysis in this regard and offers more detailed
27 guidance as to the scope of review to be undertaken here. Mount Vernon does not seek to

1 present testimony and evidence relating to *current activities* that portend a greater future
2 public use and necessity. Instead, they openly advocate the right to bring in evidence of broad
3 public policy which is not supported by the cited case law.
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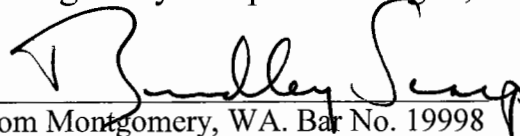
5 CONCLUSION

6 10 BNSF sought clarification through this motion because it is apparent that Respondents
7 intend to broaden the scope of review beyond what is within the WUTC's jurisdiction. RCW
8 81.53.606 outlines the proper inquiry into whether a crossing should be closed - whether the
9 public safety requires it. The WUTC is not the proper forum for environmental review or
10 discussion of growth and developing planning procedures. Respondents have also presented
11 summary factual arguments that go to the merits of the petition before the WUTC, and those
12 issues will have their day of hearing. BNSF does not ask that relevant testimony and evidence
13 be excluded from consideration, but hopefully this process will assist to properly define those
14 parameters.

15 11 Accordingly, BNSF respectfully reiterates its request that consistent with the order in
16 *Burlington Northern Railroad Company v. City of Ferndale*, that the WUTC properly limit the
17 subject matter of the hearing to matters directly related to public safety including the present use
18 of the Hickox Road crossing.

19 DATED this 17th day of September, 2007.

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21 

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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that the original and 12 copies of *Petitioner BNSF's Reply to Responses By Skagit County, City of Mount Vernon, and West Valley Farms, LLC to BNSF's Motion to Limit the Scope of the Subject Matter Before Commission* has been sent by FedEx to Carole J. Washburn at WUTC and a PDF version sent by electronic mail. I also certify that true and complete copies have been sent via electronic mail and U.S. Mail to the following interested parties:

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I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 17th day of September, 2007 at Seattle, Washington.



Lisa Miller, Legal Assistant