

SERVICE DATE

MAR - 6 1996

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

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

DANIEL T. MILLER,	)	
	)	DOCKET NO. TR-940287
Complainant,	)	

v.

C. DAVID GEORGE, A. M. PARKE, and	)	
BURLINGTON NORTHERN RAILROAD,	)	
	)	
Respondents.	)	

.....	)	
LINCOLN COUNTY, WASHINGTON,	)	
	)	DOCKET NO. TR-940851
Petitioner,	)	

v.

BURLINGTON NORTHERN RAILROAD	)	
COMPANY,	)	
	)	
Respondent.	)	

.....	)	
LINCOLN COUNTY, WASHINGTON,	)	
	)	DOCKET NO. TR-940852
Petitioner,	)	

v.

BURLINGTON NORTHERN RAILROAD	)	INITIAL ORDER DENYING
COMPANY,	)	COMPLAINT; DISMISSING
	)	PETITIONS
Respondent.	)	

Hearing on these consolidated matters was held pursuant to due and proper notice to all interested parties on December 8, 1995, at Davenport, Washington, before Administrative Law Judge C. Robert Wallis.

**Nature of Proceeding:** This order resolves three separate matters that were consolidated for hearing and order. In one proceeding, Mr. Dan Miller complains against the Burlington Northern Railway (BN). He challenges the railroad's actions in seeking agreements with the users of assertedly private crossings to allow continued use and contribution from them for the use and maintenance of the crossings. He asks the Commission to assess penalties against the railroad in the largest possible amount. The railroad and the Commission Staff oppose the complaint.

In two other proceedings, Lincoln County petitions for the construction of two railroad crossings at grade. In essence, the County asks the Commission to declare public, two crossings that are in fact open, but are not now on the Commission's list of public crossings. One of those is the crossing that Mr. Miller uses.

**Initial order:** This initial order finds that BN violated no law or rule in pursuing a claim as to Mr. Miller's crossing. The initial order therefore concludes that Mr. Miller's complaint should be denied. This initial order finds that the roads crossing the rails at those crossings are County roads, that they serve a public need, and that the crossings should be declared to be public, open crossings. Because no action need be taken to construct or open the crossings, the petitions will be dismissed.

**Appearances:** Dan Miller, Edwall, appeared in propria personam. Ronald B. Shepherd, Lincoln County Prosecuting Attorney, represented Lincoln County, petitioner. Larry E. Leggett, attorney, Bellevue, represented Burlington Northern Railroad, respondent. Shannon Smith, assistant attorney general, Olympia, represented the Commission Staff.

**MEMORANDUM**

The presiding administrative law judge sets out his findings and conclusions upon contested issues and his reasons and bases therefor in the memorandum portion of this order.

These matters provide the Commission an opportunity to consider and define the distinction between public and private railroad crossings, and to examine a railroad's actions with reference to crossings that it considered to be private. The Commission has jurisdiction over the subject matter of these proceedings and the parties to the proceedings.

In all three matters, there is virtually no dispute as to the underlying relevant facts. Burlington Northern discovered that it had no agreements on file with users of a number of crossings at grade in eastern Washington, each providing crossing access to a small number of citizens and none being indicated as open public crossings. It sent letters to the apparent users of those crossings, demanding a license fee from the persons principally using the crossings -- generally owners or renters of residential or farm properties directly across the tracks from county roads -- and also demanded prepayment of certain expenses in rebuilding the crossings.

These three proceedings relate to two of the crossings. In the vicinity of the two crossings, the railroad parallels a county road, to the north of it. Each of the two crossings serves a road that is the access between the county arterial road and one or two residences to the north of the tracks. In each case the road is the only access to the residences, which are otherwise landlocked.

The parties briefed the matters after the hearing concluded. The Commission Staff submitted a brief regarding the nature of the proceeding; no other party responded. Mr. Miller, The Commission Staff, and Burlington Northern briefed the issues in Mr. Miller's complaint. The Commission Staff and Burlington Northern briefed issues in the county's petitions. The County appeared at the hearing in support of its petitions but submitted no post-hearing memorandum.

**The County's Petitions**

**Nature of the Petitions.** The County filed petitions to open two crossings. Technically, it appears that the crossings are in fact open and that the Commission would merely declare their status. A County resolution relating to the petition acknowledges that: it resolves that "the Board petition the Washington Utilities and Transportation Commission to identify the [two] crossings as public crossings in Lincoln County, Washington." [Emphasis added].

The Commission Staff observes that this proceeding is sui generis -- that the Commission is not asked to "open" a crossing under RCW 81.53.030 because there already is a crossing at the site. Instead, Staff contends, the Commission is merely changing the designation of the crossing.

The Commission Staff observation and the County resolution are accurate in that no construction of the crossings is needed, as asked in the petition. The crossings already exist. No grading, no excavation, no paving and no construction are needed to accomplish the opening of a crossing at grade. Neither is there a change in use, such as would require a change in classification. No new usage would be authorized by a "public" designation. What appears to be requested here is the change of designation on the Commission's books and records, declaring that the crossings are public crossings.

Under RCW 81.53.030, permission must be asked for authority to "extend" a highway across a railroad track, but it is acknowledged that crossings may exist without having been approved by the Commission.<sup>1</sup> It is also provided that crossings not in conformity with

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<sup>1</sup>The statute reads in part as follows:

81.53.030 Petition for crossing--Hearing--Order. \* \* \* Whenever . . . a county . . . desire[s] to extend a highway across a railroad at grade, [it] shall file a written petition

the statute are illegal and may be abated.<sup>2</sup>

Determining the issue to be resolved is an essential first step in deciding what standards to apply and what decision is appropriate. If this is a petition to open a crossing, the Commission would look to the standards in RCW 81.53.030, weighing need against risk, exercising its discretion under the statute to determine whether an over- or underpass should be constructed or whether the crossing should be opened as a public crossing. If it is merely a proceeding to acknowledge the existence of a public crossing, the issue is whether the crossing is public or private and no exercise of discretion is needed to determine whether it should be opened.

The evidence of record indicates, and this order finds, that the roads in question predate the Commission.<sup>3</sup> The timing of the railroad's construction is not clear on the record, but it appears to be unquestioned that these railroad tracks also predate the Commission. This order concludes that the crossings in question, if public crossings, need not meet the statutory test of need before being declared "open".

**Jurisdiction.** Commission Staff first argues that the Commission lacks jurisdiction to determine whether one of the roads, the Miller road, is a county road. Staff cites RCW 36.75.110, which states,

Whenever the board [of County Commissioners] declares by resolution that the true location . . . of a county road is uncertain, it shall direct the county road engineer to make examination and survey thereof. . .

Once the determination is made, the Board is to file an action in superior court for determination of the road, with all persons affected joined as defendants. RCW 36.75.120. Commission Staff argues that the point where the road ends is uncertain; that the Commission lacks jurisdiction to decide where the road ends; and that it should stay the County's petition or dismiss it without prejudice until the County makes the required determinations and that lawsuit is completed.

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with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. \* \* \* In respect to existing railroad grade crossings over highways the construction of which grade crossings was accomplished other than under a commission order authorizing it, the commission may in any event require the railroad company to install and maintain, at or near each crossing, on both sides of it, a sign .

. . .

**<sup>2</sup>81.53.190 Abatement of illegal crossings.** If [a] grade crossing is constructed, maintained, or operated, . . . in violation of the provisions of this chapter, . . . such construction, operation, or maintenance may be enjoined, or may be abated, as provided by law for the abatement of nuisances. \* \* \* \*

<sup>3</sup>The term "commission" here includes its predecessor agencies with jurisdiction over railroad crossings.

Both witnesses agree that Miller road is a county road up to the crossing. Only at the crossing and to the north of it is there question. This order finds that the Board of County Commissioners has no apparent uncertainty about the location of the road.

**Status of the Roads**

**The Miller road.** County Road 61830, called Miller road on the record, extends about 600 to 700 feet north of the highway to the railroad crossing, then continues north to the Miller residence. The road is about 16 feet wide, elevated over the level of the field through which it crosses, and graveled. It crosses a prestressed concrete bridge that was built about 15 years ago. North of the crossing, the road is narrower, level with the field through which it passes, and has a different kind of gravel on its surface. The county has not declared by Board resolution that the location is uncertain. There is no need to apply RCW 36.75.110, and the Commission has jurisdiction.<sup>4</sup>

Mr. Buxton, the Commission Staff witness, testified that his examination of county records indicates that the county road ends at mile 0.160 and that the crossing is located at mile 0.160. He believes that the road from the crossing and to the north of the crossing is a private driveway. Mr. Breshears, the county engineer, testified credibly that according to the county road log, the road was created as a public road in 1884. The crossing is at mile 0.130 and the County road extends beyond the crossing to mile 0.160. The county accepts responsibility for maintenance for a short distance north of the crossing, but it has not conducted maintenance there for some time.

This order finds that Mr. Breshears, the County Engineer, is expert at interpreting the county road log and that he credibly placed the location of the county road both up to the crossing and to the north of the crossing. Mr. Buxton's observations as to the relative condition of the road north and south of the crossing are credible, but the relative maintenance is not a necessary indicator as to whether the road is or is not a county road. This order finds from credible evidence that the county road extends to include the crossing, and concludes that it is unnecessary to determine how much farther the road retains its county road status.

**The Sobek road.** County Road No. 63610, called the Sobek road on the record, has not been maintained by the county for some time, and is in a state of poor repair. Only upon a recent review of records did the County Engineer discover its status as a county road. Mr. Sobek testified from his knowledge as a long-time resident with the family before him at the property, that the crossing was a public crossing for at least 95 years before. Although a northerly portion of the road was vacated in 1942, the crossing is located on a portion of a county road that was never vacated.

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<sup>4</sup>Other process could be required if the Commission disagrees with the County's asserted location.

The evidence shows that the Sobek road is gated at certain times of the year when the fields between the county arterial and the railroad are used as pasture. That gating appears to be an unlawful blockage of a county road. It is not the Commission's role, however, to rule that an unlawful act by a third person changes the status of the road or deprives that status of a lawful consequence thereof. This order finds that the road is a county road.

**Status of the Crossings**

**County road status.** As to each crossing, the County Engineer Mr. Breshears has testified credibly that, based on his detailed research of county records, each road is a connector between a county arterial road and the properties on the opposite side of the railroad tracks and is itself a county road. Mr. Buxton offered a contrary view, at least as to the Miller road, but Mr. Buxton is not responsible for interpreting the county road log or for determining the status of county roads, as is Mr. Breshears.

**Status as public crossing.** RCW 81.53.010 declares that each crossing of a railway with a highway is a public crossing<sup>5</sup> within the Commission's jurisdiction and that a county road is a highway.<sup>6</sup> Unless there is support for the proposition that some county roads are not highways within the statutory definition, we must conclude that the crossings are public.<sup>7</sup> This order concludes that both crossings are public crossings.

**The "two-family" exception.** The Commission Staff cites to a Commission Order of March 31, 1995 in Burlington Northern Railroad Company v. City of Ferndale, Washington, Docket No. TR-940330, for the proposition that a railway/county road crossing at grade that serves only one or two residences constitutes a private crossing. We do not interpret the Ferndale decision in the manner cited by Commission Staff.

<sup>5</sup> The statute reads in part as follows:

The term "grade crossing" when used in this chapter, means any point or place where a railroad crosses a highway or a highway crosses a railroad, . . . at a common grade.

<sup>6</sup> RCW 81.53.010 reads in part as follows:

The term "highway," when used in this chapter, includes all state and county roads . . . and other public places actually open and in use or to be opened and in use for travel by the public. [Emphasis added.]

<sup>7</sup> The statute clearly states that the term "highway" includes "all . . . county roads." This order need not and does not determine whether any road that is open to the public and to public services -- sanitary, rescue, safety, etc. -- for access is also a public road, and its crossing a public crossing, as opposed to the statutory example of a truly private crossing where the farmer whose field is bisected must cross the tracks in order to use the remaining acreage. See, RCW 81.52.050.

There, the question of closure of a public crossing involved the need to construct additional siding tracks, with the additional dangers inherent in such a configuration adding to the inherent danger of any crossing. Train traffic was heavy at the crossing location. The only alternatives to crossing closure included maintaining an exceptionally dangerous crossing and splitting trains at the siding, itself a dangerous as well as labor-intensive task, or constructing a multi-million dollar overpass, not within the city's means. In addition, the order faced federal and state policies relating to passenger train traffic that limited Commission options. The Commission closed the crossing on condition that limited local access be permitted for the two residences.

The question of crossing closure on condition that was resolved in the Ferndale decision is totally different from the question of determining whether a crossing is a public or a private crossing. The Commission has the authority to close any public crossing to access by the general public (RCW 81.53.060). With the power to close, the Commission also has the power to impose reasonable conditions upon closure. In the Ferndale case, those reasonable conditions included continued limited access by residents of two dwellings. That decision was within the Commission's authority. That order does not stand for the proposition that the crossing of a railroad by a county road serving a limited number of residences or businesses is a private crossing.

The Ferndale decision is unlike the decision here, which is whether the crossing at grade of a railway by a highway as defined by law is a public crossing under the statutory definition.

Under the plain meaning of the statutory language, this order concludes that each crossing is a public crossing. The statute say that "all" such crossings are public. Based on the evidence of record relating to the status of the two roads and the findings that both roads are county roads, this order concludes that the crossings are public crossings.

This decision does not speak to issues of public safety; to whether existing signing is sufficient for use; or to whether the crossings should remain open or be closed. As noted above, this decision does not determine that a crossing should be changed from private to public or that a crossing should be opened. It merely declares that the crossings are now and have been public crossings, the records of the Commission notwithstanding. The railroad, the County, or the Commission on its own motion may institute proceedings to make such other safety-related determinations regarding the crossings as they feel need to do so.

**Need.** Commission Staff argues that if the roads are county roads, the Commission should not declare the crossings open unless it first determines that the public convenience and necessity require the crossings. It argues, under the Commission's order in Burlington Northern Railroad Company v. City of Ferndale, Washington, Docket No. TR-940330, that there is no need for either crossing as each serves only one or two residences. Commission Staff argues that the County's petitions should be denied.

This order concluded above that it need not determine whether the crossings meet the tests of Chapter 81.53 to be opened as new crossings. In the event that the Commission on review disagrees, this order will review need.

Under RCW 81.53.030 the Commission may determine whether an overpass or underpass should be ordered in lieu of a grade crossing. Reading the statute in conjunction with RCW 81.53.060, it is apparent that the Commission has jurisdiction to determine whether an alternate route will meet public needs or whether, on balance, need for a grade crossing outweighs the danger of the crossing.

As to each crossing, the residential and farming business activities and structures to the north of the tracks require public access. Not only the residents themselves, but essential services such as fire protection, telecommunications, railroad maintenance crews, etc., require access. Not only the residents, but persons working on the farming properties and persons doing business with the farming operations, require access. In short, there is a public need to cross the tracks for access to the residences.

The costs of an overpass or underpass were not indicated on the record. The Commission may take notice of recent cases in which overpasses or underpasses were considered as options, to the extent that such structures would cost hundreds of thousands or perhaps millions of dollars. The petitions for construction of the crossings indicate that access via alternative crossings would require construction of a roadway between the residences or farms and the alternative crossings, and that the cost of each would be at least \$100,000. Given the relatively light traffic (less than 20 vehicles a day, according to the petitions), this order finds that alternatives to the grade crossings are unreasonable. Although grade crossings are inherently dangerous, these particular crossings appear to have favorable indicators of safety. The approaches to the crossings are level and the view up and down the tracks is unobstructed.

Balancing the public need against the cost of alternatives and the conditions of the crossings, this order concludes that the grade crossings are needed at each of the crossing sites.

**Mr. Miller's Complaint**

Mr. Dan Miller contends that because Burlington Northern made demands of crossing users for money and a license to cross, the Commission should assess penalties against BN. Mr. Miller contends interference with his and others' rights. He relies on RCW sections 81.04.440, 81.04.510, 81.52.050, and 81.52.060. In particular, he asks for sanctions against BN for attempting to obtain from him through threat or duress a private road crossing agreement that would hold Mr. Miller liable for damages occurring at the crossing and require him to pay for crossing maintenance. Mr. Miller contends that such a contract would be void, in violation



of RCW 81.52.050.<sup>8</sup>

The railroad asks the Commission to dismiss the complaint, contending first that the Commission has no jurisdiction over private grade crossings and second that, whether or not this is a public crossing, the railroad has violated no public service law.

The Commission Staff asks that Mr. Miller's complaint be dismissed because the railroad appeared to operate in good faith and that the statute on which Mr. Miller relies, RCW 81.52.050, has been consistently interpreted in the courts so as not to require a railroad to fund the construction and maintenance of private crossings.

This order accepts the analysis of Commission Staff and dismisses the complaint. First, to the extent that the complaint states the existence of personal damages, and may seek recovery for those damages, it is clear that RCW 81.04.440 gives exclusive jurisdiction to the courts and not to the Commission.<sup>9</sup>

Second, it is elementary law that the Commission has jurisdiction to determine whether the Commission has jurisdiction. The Commission Staff pre-hearing motion to dismiss Mr. Miller's complaint should be denied. The complaint raised genuine issues of fact that had to be resolved in order to determine whether the Commission had jurisdiction to rule on the merits.

This order determines, above, that the crossing in question is a public crossing by virtue of the nature of the road as a county road or "highway" in the language of the statute. Because the crossing is a public crossing, the Commission does have jurisdiction to determine

<sup>8</sup>The statute reads as follows (emphasis added):

~~RCW 81.52.050 Fences--Crossings--Cattle guards.~~ Every person, company or corporation having the control or management of any railroad shall, outside of any corporate city or town, and outside the limits of any sidetrack or switch, cause to be constructed and maintained in good repair on each side of said railroad, along the line of said right of way of such person, company or corporation operating the same, a substantial fence, and at every point where any roadway or other public highway shall cross said railroad, a safe and sufficient crossing must be built and maintained, and on each side of such crossing and at each end of such sidetrack or switch, outside of any incorporated city or town, a sufficient cattle guard: PROVIDED, That any person holding land on both sides of said right of way shall have the right to put in gates for his own use at such places as may be convenient. [1961 c 14 § 81.52.050. Prior: 1907 c 88 § 1; RRS § 10507.]

<sup>9</sup>"An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation." RCW 81.04.440.

whether the respondent railroad committed a violation of law or rule and whether a penalty should be assessed.

Third, this order concludes that RCW 81.52.050 does not require railroads to pay for construction and maintenance of private crossings. See, Bullock v. Yakima Valley Transp. Co., 108 Wash. 413, 184 Pac. 641 (1919). Railroads appear to be responsible for the maintenance of public crossings under RCW 81.53.090.<sup>10</sup>

Fourth, it appears that no violation was committed.

This order finds credible the testimony of Mr. Steve Albus, the railroad's witness, Roadmaster for this railroad line, who described the circumstances of the request letters. It is clear from Mr. Albus' credible testimony that he was following the railroad's practices in dealing with the circumstances as he found them and that he was operating in good faith after consultation with Mr. Breshear's staff. There is no indication that the railroad was pursuing agreements in bad faith or with any motive or using any actions inconsistent with law. Mr. Albus believed in good faith that the crossing was private. The county also believed, in good faith, at the time, according to both Mr. Breshears and Mr. Albus, that the crossing was private.

The railroad may have committed a mistake of fact in its view of the crossing as private, and it may have committed a mistake of tact in the manner in which it broached the topic with crossing users. It also not only suffered considerable expense but was put to considerable unnecessary effort by its inability to connect citizens with the proper officials or to listen to citizen comments.

This order agrees with the railroad's statement on brief, however, that there is no evidence that it has violated any law, act, order or rule of the Commission. This order concludes from the circumstances leading up to the railroad's demands that it operated in good faith and that its actions do not violate any law or rule that the Commission has the power to enforce. No penalty should be assessed.

**FINDINGS OF FACT**

Having heretofore stated the pertinent findings and conclusions upon contested issues and the reasons and bases therefor, the administrative law judge now enters the following ultimate findings of fact and conclusions of law based upon the evidence of record. To the extent necessary and appropriate, the order incorporates the above findings, conclusions, and reasons in the following statement of findings and conclusions.

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<sup>10</sup>RCW 81.53.090 reads in part, "Whenever a highway intersects a railroad at common grade, the roadway approaches within one foot of the outside of either rail shall be maintained and kept in repair by highway authority, and the planking or other materials between the rails and for one foot on the outside thereof shall be installed and maintained by the railroad company."

**A. Docket No. TR-940851, the Sobek crossing.**

1. Lincoln County on June 27, 1994, petitioned the Washington Utilities and Transportation Commission for the construction of a public crossing at grade at the intersection of the Burlington Northern Railroad tracks and County road No. 63610. County road No. 63610 serves property occupied by the Sobek family and is known on this record as the Sobek road.

2. The Commission by its Responsible Official, Paul Curl, determined that the proposed action would have no significant adverse effect upon the environment under the provisions of Chapter 43.21C RCW, the State Environmental Policy Act or SEPA.

3. The matter was consolidated with Dockets Nos. TR-940852 and TR 940287 for hearing and order. Notice was duly given and hearing held on December 8, 1995.

4. The Sobek road, in the vicinity of the crossing, is a poorly maintained gravel access road providing local access between a county arterial road and property leased and occupied by the Sobek family. The road is designated as a public county road from the county arterial road to and including its intersection at grade with the Burlington Northern Railroad tracks.

5. At the intersection, a public grade crossing exists. No party suggests that construction, reconstruction, or other construction activity is needed to make the crossing safe and in compliance with pertinent regulations.

**B. Docket No. TR-940852, the Miller crossing.**

6. Lincoln County on June 27, 1994, petitioned the Washington Utilities and Transportation Commission for the construction of a public crossing at grade at the intersection of the Burlington Northern Railroad tracks and County Road No. 61830. County road No. 61830 serves property occupied by the Miller family and is known on this record as the Miller road.

7. The Commission by its Responsible Official, Paul Curl, determined that the proposed action would have no significant adverse effect upon the environment under the provisions of Chapter 43.21C RCW, the State Environmental Policy Act or SEPA.

8. The matter was consolidated with Dockets Nos. TR-940851 and TR 940287 for hearing and order. Notice was duly given and hearing held on December 8, 1995.

9. The Miller road in the vicinity of the crossing is a gravel access road, well maintained, providing local access between a county arterial road and property occupied by Mr. Dan Miller. The road is designated as a public county road from the county arterial road to and

including its intersection at grade with the Burlington Northern Railroad tracks.

10. At the intersection, a public grade crossing exists. No party suggests that construction, reconstruction, or other construction activity is needed to make the crossing safe and in compliance with pertinent regulations.

**C. Docket No. TR-940287, the Miller Complaint.**

11. On December 29, 1993, Mr. Dan Miller filed with the Washington Utilities and Transportation Commission a complaint against Burlington Northern Railroad and two named employees of the railroad. The Commission consolidated this matter with Docket Nos. TR-940851 and TR-950852 for hearing and order.

12. Mr. Miller resides on property served by local access road No. 63810, called the Miller road on this record. Miller road is a public county road. It intersects at grade with tracks of the Burlington Northern at what is called the Miller crossing for purposes of this proceeding. The Miller road is a public county road to and including the crossing.

13. Mr. Miller's complaint alleges that the railroad in asking him to sign a license agreement for use of the Miller crossing, accepting responsibility for all damages occurring at the crossing, and asking him to pay for maintenance of the crossing violated the law and regulation and caused him personal distress and inconvenience. The complainant asks that penalties be assessed against the railroad to the greatest extent allowable by law.

14. Burlington Northern Railroad did ask Mr. Miller to pay for crossing maintenance; did ask him to sign a licensing agreement for use of the crossing; did ask him to accept responsibility for all damages occurring at the crossing, and did threaten closure of the crossing in the event of Mr. Miller's failure to comply with its requests.

15. According to the credible testimony of Mr. Steve Albus, he, the Burlington Northern Railroad and its officials including the officials named in Mr. Miller's complaint, all had a good faith belief that the Miller crossing of its tracks by County Road No. 63810 was a private crossing. The railroad in its correspondence with Mr. Miller sought to enter the same sort of arrangement with Mr. Miller, on similar terms, as it has with users of private crossings.

16. Miller road is a county road and not a private road from its intersection with a county arterial road on the south, to and including the railroad crossing on the north.

From these findings of fact, the undersigned administrative law judge makes and enters the following conclusions of law.

**CONCLUSIONS OF LAW**

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of these proceedings and the parties thereto. Specifically, the Commission has jurisdiction to determine whether it has jurisdiction in the crossing petitions and upon so determining, to exercise its jurisdiction under title 81 RCW, and it has jurisdiction under RCW 81.04.110 to hear Mr. Miller's complaint to determine whether violations of pertinent law or rule occurred.

2. RCW 81.53.010 states that all crossings of railroad tracks by county roads are public crossings. Both the Miller and Sobek roads are county roads to and including their intersection with Burlington Northern railroad tracks. Therefore, the crossings are public crossings.

3. The recent Commission order in Docket No. TR-940330 dealt with issues relating to crossing closure and public safety under unique and especially dangerous statutes authorizing such actions, and does not support the proposition that the Commission may declare to be private crossings those crossings providing local access by means of a county road to only one or two residences, farms, or businesses.

4. The county petitions both seek the construction of grade crossings at the intersections of the Sobek and Miller roads with Burlington Northern tracks. Because the physical crossing structures already exist, the petitions may be dismissed.

5. The Sobek and Miller crossings should be included on the Commission's rolls of public crossings.

6. Burlington Northern Railroad does not have the authority under chapter 81.52 or chapter 81.53 RCW to secure user funding of public crossing maintenance or licensing or liability agreements with users of public crossings. The railroad pursued those actions in a good faith but mistaken belief that the crossing was a private crossing. The railroad's actions do not violate any rule or statute that has been called to the Commission's attention.

7. Mr. Miller's complaint should be denied.

Based on the above findings of fact and conclusions of law, the undersigned

administrative law judge hereby enters the following initial Order.

**ORDER**

The Commission hereby orders:

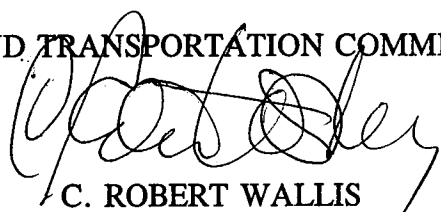
1. The Miller and Sobek crossings shall be entered appropriately on the Commission's rolls of public crossings within the State.

2. The County's petitions for construction of public crossings at the Miller and Sobek grade crossings in Docket Nos. TR-940852 and TR-940851 should be dismissed because the crossings already exist and because they predate the law requiring approval for crossings of railroads by county roads.

3. Mr. Miller's complaint against the Burlington Northern Railroad in Docket No. TR-940287 should be denied.

DATED at Olympia, Washington, and effective this 5<sup>th</sup> day of March 1996.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



C. ROBERT WALLIS  
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(4). As provided in WAC 480-09-780(5), 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, 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 is 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.