

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY, Petitioner)	DOCKET NO. TR-070696
)	
v.)	CITY'S OBJECTIONS TO
)	WASHINGTON STATE UTILITIES
CITY OF MOUNT VERNON,)	AND TRANSPORTATION
)	COMMISSION PREHEARING
Respondent)	CONFERENCE ORDER
)	
And)	
)	
SKAGIT COUNTY , WASHINGTON)	
STATE DEPARTMENT OF)	
TRANSPORTATION, WEST VALLEY)	
FARMS LLC, and SKAGIT COUNTY,)	
)	
Intervenors)	
)	

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UTILITIES AND TRANSPORTATION
COMMISSION

- 1. NAME AND ADDRESS OF PLEADING PARTY.** The City of Mount Vernon, Respondent, located at 910 Cleveland Avenue, Mount Vernon, Washington 98273

- 2. INTRODUCTION AND AUTHORITY.** This matter comes before the Washington State Utilities and Transportation Commission (WUTC) to consider Petitioner's request to abandon and close to public use a railroad-highway grad crossing located at Hickox Road, Mount Vernon in accordance with RCW 81.53.060 and all applicable law. The WUTC convened a prehearing conference on Friday, July 13, 2007 in which the City appeared, moved to intervene, orally requested broadening of the issues and identified potential issues to be presented for hearing. The WUTC issued Prehearing Conference Order; Notice of Second Prehearing Conference No. 01 on July 20, 2007 which, in part, set forth issues to be presented at the hearing on the merits in which the case would be generally limited. The order allows for objections to any provisions of the Order so long as filed within ten (10) days after the service date.

- 3.** The City respectfully submits the following objections to the order and issues provided in the order based on the authority and argument herein and respectfully requests inclusion of those issues identified by the City.

OBJECTIONS TO ISSUES WITHIN PREHEARING ORDER 01

4. **City objects to Order 01 to the extent the Order limits the issue of whether public safety public requires closure to impacts of closure to local emergency preparedness which would be determined by 1) the effect on response times for emergency services and 2) the effect on flood hazard evacuations (including farm animals).**
5. In order to prevail at hearing, the Petitioner must first establish that public safety requires closure of the railroad crossing in question. RCW 81.63.060. In order to establish there exists a level of risk to the general public compelling closure or alternatively to rebut the proposition that public safety requires closure all evidence that would tend to make the existence of any fact of consequence to the factual issue that public safety compels closure of the crossing more or less probable must be allowed. Therefore, limiting the public safety issue to the impacts the closure will have to provisions of police and fire services or local emergency planning precludes otherwise relevant evidence to be presented at hearing. For example, other factors which have been considered in order to reach the threshold determination of whether public safety requires closure include: 1) the existence of vegetation and other obstacles that limit the motorists view of the tracks as the motorist approaches the crossing¹, 2) the alignment of the roadway approach to the crossing² 3) the holding capacity on the approach between the railroad right of way and streets that intersect with the approaches³, 4) the number of mainline tracks at the crossing⁴, and 5) the presence or lack of any other tracks or siding tracks at the crossing.⁵
6. It is the City's intent to bring forward all relevant evidence that public safety will not require closure of the railroad crossing in question, including but not limited to presenting evidence involving the factors outlined above.
7. **City objects to Order 01 to the extent it limits the issue of whether the public convenience and necessity outweighs any danger of the crossing shown by the Petitioner to the impacts of the closure to regional planning.**
8. Should it be established that the grade crossing is dangerous and unsafe, the Washington Supreme Court, citing language within the findings of a Department of Transportation administrative ruling subject to review, held that the WUTC must

¹ Whatcom County v. BNRC, Docket Nos. TR 1725 and TR-1726 (Jan. 1985)

² Thurston County v. BNR, Docket No. TR-1930 (April 1988)

³ Whatcom County, supra note 4

⁴ DOT v. Snohomish County, 35 Wn.2d 247 (1949)

⁵ Spokane County v. Burlington Northern, Inc., Cause No. TR-1148 (Sept. 1985); BNSF v. City of Ferndale, Docket No. TR 940330

further determine whether “.the convenience and the necessity of those using the crossing and whether the need of the crossing is so great that it must be kept open notwithstanding the dangerous condition.”⁶ The WUTC has construed this holding broadly requiring a balancing of the public convenience and need for the crossing against the danger of the crossing.⁷

9. Neither terms public convenience nor public need are defined within state statute or Washington case law. As such, the WUTC has allowed a wide latitude of issues to be raised and presented beyond regional transportation planning impacts in order to determine public convenience and necessity.
10. Factual issues previously looked to by the WUTC include: 1) Are there available alternate crossings in an urban area in close proximity and sufficient numbers?; 2) What is the ability of those crossings to handle additional traffic?; 2) What are the number of people affected by the closure?;⁸ 3) What is the amount and character of travel on the railroad and on the highway?; 5) Do the alternative crossings have the ability to handle any additional traffic that would result from the closure?;⁹ and 6) Are the alternative crossings safer and readily available?¹⁰
11. To the extent the order limits the issues presented at the hearing on the merits involving public convenience and necessity to the impacts on planning transportation, the order prevents the parties of raising other issues relevant to the broader issue of public convenience and necessity including those identified above.
12. **City objects to Order 01 to the extent it limits issues of public convenience and necessity to only regional planning and objects on the further grounds to the extend it precludes raising issues of public policy considerations identified elsewhere by the state legislature which will be effected by closure and relevant to public convenience and need.**
13. As stated previously, the WUTC has construed the term public convenience and public need broadly allowing for not only individual impacts of users of the crossing as identified by the Supreme Court, but examining broader public policy issue regarding such a closure. Consistent with the WUTC’s broad construction, the WUTC has included in its deliberations policy considerations regarding the effect such a closure has on larger public policy issues identified by Washington State

⁶ Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949).

⁷ Burlington Northern Santa Fe v. City of Ferndale TR 940330 (1995); Burlington Northern Railroad, Company v. Skagit County Docket No. TR-940282 (Dec. 1996) .

⁸ Burlington Northern Santa Fe v. City of Ferndale TR 940330 (1995).

⁹ Burlington Northern Railroad Company v. Skagit County Docket No. TR-940282 (Dec. 1996).

¹⁰ Union Pacific Railroad v. Spokane County, Docket No. TR 950177 (1996).

Legislature elsewhere within state law. For example, affirming an initial order of closure of an at grade crossing in the City of Ferndale, the WUTC cited the state policy supporting the operation of passenger service embodied within Chapter 47.79 RCW establishing a high-speed ground transportation system which the closure purportedly promoted as additional grounds to support public need for such a closure.¹¹

14. The City has previously raised concerns that closure of the crossing will detrimentally impact and run against public policy found elsewhere within state law. Specifically, the policies identified in our state legislature within Washington State's Growth Management Act (GMA) declare that the State's public policy include: 1) efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans¹²; 2) maintaining and enhancing natural resource-based industries, including agricultural and encouraging the conservation of productive agricultural lands¹³, 3) the protection of critical areas.¹⁴
15. Just as the WUTC identified public policy found elsewhere by the state as relevant to whether there existed public need and convenience that the closure will promote interconnectivity and passenger service elsewhere codified elsewhere in state law, so should the WUTC allow parties to raise public policy found elsewhere in which Washington State's legislature identified.
16. **City reserves the right to further raise and continues to raises objections to violation(s) of the State Environmental Policy Act.**

As stated in Order 01, compliance with the State Environmental Policy Act (SEPA) was raised at the July 13 prehearing conference. Additionally, WUTC staff has, pursuant to the Order, published a letter from the responsible the Director of Regulatory services (the responsible SEPA Official identified within WAC 480-11-030) explaining its position that grade crossing closures are not categorically exempt from SEPA. This includes, at a minimum, designating a lead agency, completing an appropriate environmental checklist which fully discloses all environmental matters so that environmental matters can be given proper consideration during decision-making by the governmental agency taking action on that proposal, and making a threshold determination of significance. To date, no steps toward conducting an appropriate environmental review under SEPA for the petition has been conducted to the City's knowledge and the City continues to objects and raise issues involving SEPA

¹¹ See BNSF v. Fernadale TR 94033 (1995) (citing state policy embodied within RCW 47.79 supporting the operation of passenger service).

¹² RCW 36.70A.020 (3)

¹³ RCW 36.70A.020(9)

¹⁴ RCW 36.70A.060

compliance and environmental review of the proposal which must be combined with the procedure for review of the project. Thus, to the extent that the order fails to acknowledge or incorporate any and all issues raised under SEPA the City objects to the order on those grounds. Specifically, the City raises the following issues relevant to SEPA that would be presented either at the hearing or in the appropriate motion while reserving its right to object to further determination by the appropriate agency under SEPA that may arise:

17. **What is the proper agency to be lead agency for SEPA review?** SEPA rules specify the procedure for determining when and how a lead agency is to be designated for a proposal. WAC 197-11-922 through – 948. The lead agency is the only agency responsible with complying with the threshold determination procedures and responsible for the preparation and content of the EIS.¹⁵ WAC 197-11-050. The assumption of lead agency status by another agency with jurisdiction is optional not mandatory. *Steelhead and Salmon Council v. Department of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995). WUTC staff has opined that Washington State Department of transportation is the necessary lead agency as the proposal for closure relates to a WSDOT project involving siding extension project. However, lead agency status may involve further analysis which, depending on the nature of the proposal may dictate different lead agency. For example, the closure of the extension allows for the creation of siding track whose purpose is to allow for the storage of freight on the rails siding track yielding the right of way to passenger rail service. However, should the siding track result in a site capable of storing a total of one million or more gallons of any liquid fuel not under the jurisdiction of EFSEC, the lead agency would be the department of ecology. WAC 197-11-938. The City reserves the right to bring forth the appropriate motions to the Dept. of Ecology or other agency with appropriate jurisdictions over a lead agency determination.

18. **What is the proper scope of the proposal subject to SEPA review?** The proposal subject to environmental review must be properly defined. Specially defined by WAC 197-11-784 and discussed in WAC 197-11-060(3), proposals or parts of proposals that are related closely enough to each other to be, in effect, a single course of action must be evaluated in the same environmental document. As stated by WUTC staff, a review maybe done with phases if it complies with circumstances set forth in WAC 197-11-060 (5).¹⁶ However, such phasing is impermissible if it serves to avoid discussion of cumulative impacts.¹⁷ The City reserves the right to bring forth the appropriate motions to the WUTC or other

¹⁵ WAC 197-11-060 (3)(b).


¹⁶ See *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wn.2d 201, 634 P.2d 853 (1981).

¹⁷ See *Indian Trail Property Owner's Ass'n v. City o Spokane*, 76 Wn.App. 430, 443, 886 P.2d 209 (1994); See also *Merkel v. Port of Brownsville*, 8 Wn.App. 844, 509 P.2d 390 (1973).

tribunal with appropriate jurisdiction over the SEPA determination of scope subject to review.

19. **Has the proposed action violated SEPA timeframes for review and procedural statutes and regulations?** The lead agency must prepare its threshold determination and EIS, if required, at the earliest possible point in the planning and decision-making process when principal features of the proposal and environmental impacts can be reasonably identified.¹⁸ This must occur before the agency takes any major action.¹⁹ Moreover, the process for environmental review of a proposal must be combined with the procedure for review of project permits. Unless an exception applies under RCW 43.21C.033(2), the responsible official must make a threshold determination on a completed application within ninety days after the application and supporting documentation are complete. The City reserves the right to bring forth the appropriate motions to the WUTC or other tribunal with appropriate jurisdictions over any and all procedural SEPA violations.

Respectfully Submitted this July 30th, 2007.


Kevin Rogerson WSBA #31664
City of Mount Vernon
City Attorney
PO Box 809
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July 30, 2007

¹⁸ WAC 197-11-055.


¹⁹ Lassila v. City of Wenatchee, 89 Wn.2d 804, 576 P.2d 54 (1978).

DECLARATION

I, Kevin Rogerson, declare and affirm that this pleading is true and complete to the best of my knowledge and belief.

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

Dated this 30th day of July, 2007 at Mount Vernon, Washington.



Kevin Rogerson WSBA# 31664
City Attorney
City of Mount Vernon

CERTIFICATE OF SERVICE

Chrissy Sprouse states and declares as follows:

I am a citizen of the United States of America, over 18 years of age and competent to testify to the matters set forth herein. On July 30th, 2007, I hereby certify that I have this day served by first class mail, postage prepaid, and an electronic submission a true and correct copy of the foregoing document(s) upon all parties of record in this proceeding entitled CITY'S OBJECTIONS TO WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION PREHEARING CONFERENCE ORDER on the following:

PETITIONER

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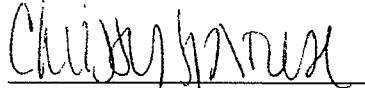
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DATED this 30th day of July, 2007 at Mount Vernon, Washington.


Chrissy Sprouse, Paralegal