[Service Date September 12, 2007]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent

And

SKAGIT COUNTY , WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, WEST VALLEY FARMS LLC, and SKAGIT COUNTY,

Intervenors

DOCKET TR-070696

MOUNT VERNON'S RESPONSE TO BNSF'S MOTION TO LIMIT THE SCOPE OF THE SUBJECT MATTER BEFORE COMMISSION

I. INTRODUCTION

1 Respondent Mount Vernon submits the following response to Petitioner BNSF's motion seeking to limit the scope of the matter before the Washington State Utilities and Transportation Commission (the Commission) so as to disallow the Commission to undergo the necessary environmental review of the Petition for closure and to further limit otherwise relevant evidence to the issue of the public convenience and necessity to the present public need.

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II. STATEMENT OF FACTS

2 Mount Vernon incorporates by reference the Statement of Facts provided in its Motion for partial Summary Judgment and Motion in Limine filed August 28, 2008.

III. EVIDENCE RELIED UPON

3 This motion is based upon the pleadings and materials on file in this action.

IV. AUTHORITY AND ARGUMENT

4 **A. The Washington Supreme Court Broadened the Legal Standard Beyond Public Safety when it Required The Commission To Determine Whether the Public Interest will be Served by Closing the Crossing.**

5 Chapter 81.53 RCW grants the Commission authority to regulate railroad grade crossings. As Petitioner correctly asserts, RCW 81.53.060 establishes that the threshold issue to be determined is whether a grade crossing should be closed on the grounds of public safety. However, the Washington Supreme Court has ruled that the statutory language further implies a second test be applied in the event Petitioner's establish that the crossing is a danger to the public. *See* Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949). This test involves evaluating 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" Id. at 254. Rather than looking at "convenience and need" independently, the Commission has interpreted that the appropriate legal standard to apply is balancing or weighing of the degree of danger that the crossing presents against the "public convenience and need" for the crossing to remain open:

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6 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.

Burlington Northern Railroad Company v. City of Ferndale, Docket No. TR 940330.

7 To date, Mount Vernon has been unable to identify through an examination of Washington case law, Washington statute, or the Commission's administrative rules a precise definition of 'public convenience and necessity' in the context of a Petition for closure of a railroad crossing. It is argued by Mount Vernon that the term 'public convenience and necessity 'is generic, leaving to the Commission the widest latitude for its definition in the unlimited variety of circumstances which it may face. Moreover, it is evident that the phrase comprehends, not the needs of the Petitioner, Respondent or any party to this proceeding, but the needs of the Community, the Public to whom the crossing serves, and which presumably is indifferent to the needs of BNSF for side tracking which has been stated as grounds for such closure so long as the community has some method which is as adequate and convenient to allow for the transportation services that the crossing provides.

8 BNSF cites a Commission ruling as authority for limiting the weighing of public convenience and necessity to current and directly foreseeable use of the crossing. *See BNSF's Motion at page 6 Citing* Burlington Northern Railroad Company v. City of Ferndale, Docket No. TR 940330. However, close examination the Supreme Court ruling

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setting forth the legal test in Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949), the cases on which it relies, and use of the term by federal regulatory agencies of railroad services when that term is undefined, clearly demonstrate that the Commission should employ the widest latitude and allow all relevant factors to be entered into evidence including evidence of reasonably foreseeable future uses and needs of the Public. Only by providing such latitude will the Commission, which the Legislature has entrusted as the role of fact finder, be able to hear and weigh all relevant evidence offered, so that it may appraise the facts from an analysis of the infinitely variable factors contributing to the total situation. This is necessary in order for the Commission to use its necessary discretion to reach the ultimate issue on which side of the controversy the public interest lies.

1. The holding by the Supreme Court in Dept. of Transportation v. Snohomish County did not limit evaluation of public use and necessity of the crossing to current use rather it relies on the Commission's discretion in finding all relevant facts.

9 In Dept. of Transportation v. Snohomish County, the Washington State Dept. of Transportation (at that time the state agency entrusted by the Legislature with the authority to establish under crossings or grade crossings, change the location of an existing highway crossings, or to cause the closing of discontinuance of an existing highway crossing) ordered closing of a grade crossing to vehicular traffic at the location of Park Avenue and the Great Northern Railway tracks in the town of Mukilteo while further ordering the same crossing to remain open for pedestrian traffic finding that the public interest would not be served by closing the crossing to pedestrian traffic . Id. at

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254-55. The order, to the extent closure was ordered for vehicular traffic, was reversed by the Superior Court. Id. at 248. The Department and Great Northern Railway appealed the decision to reverse the Department's Order to close the crossing to vehicular traffic. Id. at 248, 257. While recognizing the need to the balancing the public interest against the degree of danger of the crossing, the Court declined to limit the public convenience and necessity test. Rather, the Court declined choose not to such limitations on what evidence the Department entrusted to make the decision allowed so long as the record indicated that the department acted "unfairly, arbitrarily or in disregard of the testimony." Id. at 258. The Court, citing a previous ruling, stated the rationale for such a hands off approach:

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> "Unless we can say that the order of the commission [Department of Public Service] is wrong in the sense that its discretion has been arbitrarily exercised, we must, under well settled rules, say that it is not to be overcome by judicial decree. To do so would be but to substitute our own will for that of the commission, and in so doing we would in all probability trench upon some equities while declaring others." Dept. of Transportation v. Snohomish County at 258 *citing* State ex rel. Tacoma Eastern R. Co. v. Northern Pac. R. Co., 104 Wash. 405, 413, 176 Pac. 539.

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Rather than serving to suggest that the Court would limit the Commission to looking at only current and existing uses when determining public convenience and necessity, Dept. of Transportation v. Snohomish County stands for the proposition that Commission should be given the widest latitude to allow all relevant factors entered into evidence to which the Commission is then entitled to weigh in making its findings on whether closing of the crossing lies within the public interest.

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12 **2. Previous Supreme Court Case Law, on which Dept. of Transportation v. Snohomish County, Relies, Explicitly Holds that Evidence of Future Public Need for the Service Should Be Allowed if Reasonably Foreseeable.**

13 Most importantly and pertinent to the matter at hand, the Court in Dept. of Transportation v. Snohomish County specifically cited and relied on a previous ruling in which the findings of public convenience and necessity by a state agency were challenged. Id. at 257; *citing* Northern Pac. Ry. Co. v. Department of Public Works, 144 Wash. 47, 256 P. 333 (1927). In Northern Pac. Ry. Co, identical to what Petitioners argue, Appellants challenged the Department's findings of public convenience and necessity on the grounds that the department "was not authorized to speculate as to future convenience and necessity." Id. at 52. Appellant argued that the Department must make such finding "only upon a showing of present convenience and necessity." Id. at 52.

14 The Supreme Court in Northern Pac. Ry. Co., citing to the broad regulatory powers conferred upon the department by statute, specifically rejected placing such a limitation. Id. at 54. By doing so the Court specifically stated the Department is entitled to examine and base part of its findings of public convenience and necessity on future developments so long as it rests upon substantial testimony:

15 > It rests upon substantial testimony, and, if the situation contemplated by the findings and order should not occur, no harm will have been done on account of the order, while, on the other hand, if the development does occur, which appears to be reasonably certain, it will be well that at that time all controversy over the certificate of convenience and necessity shall have been settled and disposed of. Id. at 54.

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16 Moreover, the Court goes on to state that such evidence of future need should be examined citing other state authority as an example where the principle and procedure for such a determination is the same:

17 > The principle and procedure are similar to that announced in the case of Wabash. C. & W. Ry. Co. v. Commerce Commission, 309 Ill. 412, 141 N.E. 212.'The Commerce Commission has a right to, and should, look to the future as well as to the present situation. Public Utilities are expected to provide for the public necessities, not only today, but to anticipate for all future developments reasonably to be foreseen. The necessity to be provided for is not only the existing urgent need, but the need to be expected in the future, so far as it may be anticipated from the development of the community, the growth of industry, the increase in wealth and population, and all the elements to be expected in the progress of a community. Id. at 54.

18 The Commission must look at and follow the precedent set forth by the Supreme Court cases cited above. To the extent the Commission's ruling in Ferndale fails to follow such precedent, such authority is not persuasive and cannot be relied on.[1]

19 **2. Federal Regulatory Definitions of Public Use and Necessity have Explicitly Considered the Public's Future Need to the Service and Should be Applied by Analogy.**

20 When faced with having to apply an undefined term, Washington Courts have previously looked to comparable statutory and regulatory schemes from other jurisdictions for guidance. *See* Modern Sewer Corporation v. Nelson Distributing, 125 Wn. App. 564, 569 (2005) (Examining the Comprehensive Environmental Response,

[1] As mentioned by Mount Vernon in previous pleadings, it is interesting to note that while the Commission in Ferndale opined that it would only consider the present need for the crossing, the Commission still felt it necessary to identify public policy set forth within 47.79 RCW identifying the future need for a high-speed ground rail transportation system as a policy consideration to support closure of the crossing which suggests that the Commission was de facto following the Supreme Courts ruling in Northern Pac. Ry. Co. Burlington Northern Railroad Company v. City of Ferndale, Docket No. TR 940330 at page 7.

City of Mount Vernon
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Compensation, and Liability Act (CERCLA) [42 U.S.C. §§ 9601-9675] definition of 'disposal' to assist defining the term as used within the Model Toxics Control Act (MTCA), chapter RCW 70.105D); *see Also* Alexander v. Department of Employment Security, 38 Wn. App. 609 (1984) (Examining U.S. Department of Labor commentary and case law from other jurisdictions definition of "educational institution" to assist defining that term as used within former RCW 50.44.050 setting forth exceptions denying unemployment benefits.)

21 The federal regulatory scheme concerning the transportation industry in general and railroad transportation in particular, set forth by the Interstate Commerce Act, (Title 49 USC) and it amendments thereto, use of the term 'public convenience and necessity' provides a definition that specifically includes an examination of future need for the service by the public. *See* Trans-American Van Service, Inc. v. Interstate Commerce Commission, 421 F. Supp. 308 (1976). In Trans-American the federal agency entrusted with enforcing the Act (formerly the Interstate Commerce Commission whose remaining functions have been given to the Surface Transportation Board) was required to determine whether a proposed transportation service subject to the Act is required by public convenience and necessity. Id. at 317. As in the instant case, nowhere in the Act, is the term "public convenience and necessity" defined. Id. at 317. The Court, while acknowledging the Commission broad expert discretion in applying the term, still indicated the need to identify relevant factors when that agency is faced with arbitrary and capricious action for lack of definition. Id. at 319. The Court noted that the ICC

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decision concerning issuance of a Certificate of Public Convenience and Necessity could only be based on adequate subordinate findings if the order and report considered all relevant factors drawing its conclusion on the total situation taking into account the infinite variety of circumstances that may occur. Id. at 319. Among the particular indicative factors the Court began to identify (though not exhaustively), it specifically recognized that "Another factor the Commission must always consider is the future needs of the public and commerce." Id. at 328. The Court went on to state that this should be considered even when those future needs remain uncertain. Id. at 328.

22 BNSF maintains that since future development amount to conjecture or hypothetical development and necessarily gives rise to highly speculative evidence and on this basis all such future development or future need should not be considered. *See BNSF's Motion at page 7.* However, clearly, it is possible to present evidence of future developments reasonably to be foreseen. Such evidence would include vested applications for land use developments and approved planning documents and planning policies that are a part of a local jurisdictions comprehensive plan such as budgeted capital improvement projects, planned transportation routes and studies for projected needs during growth within the 20 year planning horizon. Such evidence is more than merely speculative and should be considered relevant in the Commission's determination public convenience and necessity in order to obtain an accurate picture of the total situation. Without allowing such evidence, any determination by the Commission of public interest would be based on inadequate findings and further frustrate the policy identified within the states Growth

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Mount Vernon, WA 98274
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Management Act, of accommodating wise and planned growth in the area potentially affected by the proposed closure.

23 **B. The WUTC is An Agency Subject to the State Environmental Policy Act (SEPA) Must Conduct a Review for Environmental Compliance.**

Every government agency that makes a decision on a particular proposal must comply with SEPA. SEPA implements its policy by requiring all branches of government of the state, including state agencies, municipal and public corporations, and counties to comply with its requirements. RCW 43.21C.030. Since its passage, each governmental agency has had to comply with the requirements of SEPA in addition to the obligations, policies, and criteria that may already exist in the agency's enabling legislation. RCW 43.21C.060. The provisions of SEPA thus "overlay" the existing statutory authority for decision making by a particular agency. Polygon Corp. v. City of Seattle, 90 Wn.2d 59, 578 P.2d 1309 (1978); Sisley v. San Juan County, 89 Wn.2d 78, 569 P.2d 712 (1977). SEPA explicitly authorizes and directs that all agencies of government of the state "adopt rules pertaining to the integration of the policies and procedures of this chapter (the state environmental policy act of 1971), into the various programs under their jurisdiction for implementation" RCW 43.21C.120(1). The WUTC has adopted the provisions of chapter 197-11 WAC (SEPA guidelines adopted by the department of ecology).

Failure to comply with SEPA can invalidate agency actions on the basis that such actions are ultra vires. Nole v. Cole, 98 Wn.2d 375, 655 P.2d 245 (1982). The

City of Mount Vernon
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Mount Vernon, WA 98274
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responsibility for insuring compliance with SEPA may not be contracted away by the agency. Miller v. City of Port Angles, 38 Wn.App. 904, 691, P.2d 229 (1984), *review denied,* 103 Wn.2d 1024 (1985).

Thus the WUTC, as with all branches of government of the state, has been granted, through the supplemental authority by the enactment of SEPA, subject matter jurisdiction and is mandated to comply with the policies and procedures set forth in SEPA. As previously briefed by the City, grade crossing closures are not exempt from SEPA and constitutes a covered action. WAC 197-11-856(2). WAC 197-11-600 sets forth the criteria for determining whether preexisting environmental documents may be used unchanged by the WUTC to meet all or part of its responsibilities under SEPA. Mount Vernon has submitted in its previous briefing additional environmental information and has challenged the adequacy of WSDOT's previous environmental review in regards to the closure. The WUTC must consider all the environmental information regarding BNSF's petition through the guidelines adopted by Ecology before making a decision on the proposal.

24 **C. WUTC's Environmental Review of the Closure is a Function of the States Traditional and Essential Police Powers Involving Public Roads and its Jurisdiction is not Preempted by the Surface Transportation Board (STB) for grade crossings.**

25 BNSF contends that the STB has exclusive jurisdiction under the Interstate Commerce Commission Termination Act (ICCTA) over environmental review of the affects of the proposal for closure. *See BNSF's Motion at page 9.*

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26 Petitioner relies on City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998), that such preemption is to be broadly applied and must extend to environmental review of BNSF's proposal for closure of the at-grade crossing. Id.

27 Auburn concerns the reopening of a railroad line. Auburn at 1028. The Auburn Court upheld the STB's finding that compliance with state and local environmental regulations was not required because the regulations were preempted by 49 USC 1501, part of the ICCTA, which establish pre-emption over "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if tracks are located, on intended to be located, entirely in one State." Id. at 1031 However, Auburn is distinguishable in the instant matter.

28 **The ICCTA does not grant the STB exclusive jurisdiction over grade crossings.**

29 The issue in this case is whether the ICCTA preempts state law regarding grade crossings. BNSF fails to cite any cases about whether the ICCTA has preempted state law regarding grade crossings. In fact, courts have recognized the traditional state police power over grade crossings and traditional state regulation of public roads and have narrowly construed Congress's preemption language in the ICCTA exempting that language from preempting state or local laws when it comes to grade crossings. *see* Home of Economy v. BNSF, 694 N.W. 2d 840, 856 (2005) (holding that the ICCTA does not explicitly preempt state law regarding grade crossings and discerning no actual conflict between the STB's exclusive jurisdiction with respect to regulation of rail transportation under the ICCTA and states traditional authority regarding grade

City of Mount Vernon
910 Cleveland Avenue
Mount Vernon, WA 98274
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crossings.); *see Also* Wheeling & Lake Erie Ry. Co. v. Pennsylvania Pub. Util. Comm'n, 778 A.2d 785, 790-92 (2001) (holding the ICCTA did not preempt state authority to regulate rail-highway crossing bridge and allocate costs of maintenance and reconstruction).

30 In Wheeling, the Court concluded Congress clearly intended to preempt only the states' previous authority to economically regulate transportation within states' borders with respect to such matters as the operation, rates, rules, routes, services, drops, facilities, and equipment, and to reserve the states' police power to regulate the safety of rail-highway crossings. Id. at 792. The Court concluded there was no conflict between the exclusive jurisdiction of the STB to economically regulate rail carriers under the ICCTA and the states' authority to regulate the public safety of rail-highway crossings, which are part of the public highways. Id. This is consistent with the legislative history for the ICCTA which according to the federal House Transportation and Infrastructure Committee, "in passing the ICCTA, Congress meant to 'occupy [ ] the entire field of economic regulation of the interstate rail transportation system,' but retain for the states 'the police powers reserved by the Constitution.' H.R. Rep. No. 104-311, 104th Cong., 1st Sess., at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08."

31 Consistent with that reservation of police powers and primary intent of the ICCTA to preempt economic regulation of railroads, and keeping in mind the general rule that preemption of state law if disfavored, courts continue to allow state use of its police powers over railroad activity that ICCTA preempt so long as such regulation does not

City of Mount Vernon
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substantially interfere with the economic regulation of interstate rail system or its operations. *See* Jones v. Union Pacific Railroad Company, 94 Cal.App.4th 1053, 1060 (2000); *see Also* Oklahoma Corporation Commission v. BNSF, 24 P.3d 368, 371 (2000).

32 It is clear that in the instant matter, the ICCTA does not serve to preempt a proposal for grade crossing closure as Congress has not explicitly preempted state law regarding grade crossings, and Washington law has long recognized the traditional state police power over grade crossings. (RCW 81.53.060). However, should the Commission find that ICCTA does apply, the WUTC's exercise of the states police powers through SEPA should still apply in the instant matter as mitigation for environmental impacts would not serve to prevent the Project but rather serve to adequately address any significant environmental consequences that the Project may have to the natural or built environment.

33 V. CONCLUSION

34 Both persuasive authority and Washington precedent outline that the proper parameters to determine whether public convenience and necessity outweigh any dangers of crossing Petitioners may show must include reasonably foreseeable future needs the public may have for the crossing. This is a necessary and relevant factor needed to be examined by the Commission in order to accurately draw any conclusions from the total situation. Failure to consider all relevant factors concerning a determination of Public Convenience and Necessity would result in a decision based on inadequate findings and should be

City of Mount Vernon
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Mount Vernon, WA 98274
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avoided. Moreover, the WUTC is required under state law to conduct an environmental review under SEPA, because this is a Petition for closure of a grade crossing involving public roads, federal law does serve to preempt such review.

35 DATED this 12th day of September, 2007

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