

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

BNSF RAILWAY COMPANY,	)	
	)	DOCKET TR-070696
	)	
Petitioner,	)	ORDER 03
	)	
v.	)	
	)	ORDER DENYING BNSF
CITY OF MOUNT VERNON,	)	MOTION TO LIMIT ISSUES AND
	)	DENYING CITY OF
Respondent.	)	MOUNT VERNON MOTIONS
	)	FOR SUMMARY JUDGMENT
	)	AND IN LIMINE
.....	)	

1     **NATURE OF PROCEEDING.** Docket TR-070696 involves a petition by Burlington Northern Santa Fe Railway Company (BNSF) 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 Revised Code of Washington (RCW) 81.53.060.

2     **CONFERENCE.** The Washington Utilities and Transportation Commission (Commission) held a prehearing conference in this proceeding before Administrative Law Judge Adam E. Torem on September 19, 2007, at Seattle, Washington.

3     **APPEARANCES.** Bradley Scarp, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represents 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. Scott Lockwood, Assistant Attorney General, Olympia, Washington, represents the Freight Systems Division of the Washington State Department of Transportation (WSDOT), Tumwater, Washington. Brian Snure, Snure Law Office, PSC, Des Moines, Washington, represents Skagit County Fire Protection District No. 3, Conway, Washington. Gary T. Jones, Jones & Smith, Mount Vernon, Washington, represents David Boon, Yvonne Boon, and Western Valley Farms, LLC, local residents and their corporation. Jonathan Thompson,

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

4     **PROCEDURAL HISTORY.** Judge Torem presided at a prehearing conference in this proceeding on July 13, 2007, at Olympia, Washington. The Commission entered Order 01 on July 20, 2007, setting out the scope of issues to be presented at hearing, ruling on petitions for intervention, and invoking the Commission's discovery rules.

5     Judge Torem presided at a second prehearing conference in this proceeding on August 1, 2007, at Olympia, Washington. The Commission entered Order 02 on August 14, 2007, slightly modifying the scope of issues to be presented at hearing and establishing a procedural schedule including a deadline for the filing of prehearing motions, dates for prefilings testimony and exhibits, as well as a week of hearing dates for taking public comments and presenting evidence.

6     In accordance with the schedule set out in Order 02, BNSF filed a Motion to Limit the Scope of the Subject Matter Before Commission and the City of Mount Vernon filed a Motion In Limine and Motion for Summary Judgment Requiring New SEPA Determination by the WUTC. All parties were given the opportunity to file responses and, as appropriate, replies to these motions. All parties were also given the opportunity to present oral argument at the September 19 conference.

7     **SCOPE OF SUBJECT MATTER.** BNSF's motion seeks to limit the scope of the subject matter in this hearing to those matters dealing directly with the public safety. The City's Motion in Limine seeks to expand the issues to be presented at hearing to allow for a showing that closure of the crossing will detrimentally impact and run against public policy found elsewhere within state law, including the Growth Management Act (GMA).

8     There is no dispute among the parties that the statutory standard set out in Revised Code of Washington (RCW) 81.53.060 for determining whether a grade crossing should be closed is whether "public safety requires . . . the closing or discontinuance of an existing highway crossing." Also, all parties apparently agree that if the Commission finds a grade crossing dangerous and unsafe, it must investigate and "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.”<sup>1</sup> Further, the parties have looked to previous Commission determinations<sup>2</sup> and agreed that the following factors are typically used to evaluate the impact of closing a crossing:

- 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 closure; and
- the effect of closing the crossing on public safety factors such as fire and police control.

Order 02 in this case applied these statutory and precedential standards to the specific questions posed by the proposed closure of the grade crossing at Hickox Road, which is located in a known floodplain on the outskirts of the Mount Vernon city limits, and set out a list of issues for the hearing on the merits.

9 BNSF argues that the Commission should not entertain evidence regarding the impact of its proposed closure on existing regional transportation plans because the potential impacts would occur in the future, if at all. BNSF asserts these impacts are speculative in nature and are outside the scope of RCW 81.53.060 and the Commission’s previous adjudications in this arena.

10 BNSF relies on the Commission’s decision in the *City of Ferndale* case, quoting passages indicating that “only the present public need should be considered in determining whether to close a crossing” and that “even if future need for a 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

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<sup>1</sup> *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 254 (1949).

<sup>2</sup> See *Burlington Northern Railroad Co. v. Skagit County*, Docket No. TR-940282, Findings of Fact; Conclusions of Law; and Order Closing Green Road Crossing and Granting Leave to Withdraw Petition as to Four Crossings (Dec. 1996); see also *Burlington Northern Railroad Co. v. City of Ferndale*, Docket No. TR-940330, Commission Decision and Order Denying Review; Affirming Initial Order Granting Petition to Close a Rail Crossing (Mar 1995).

uncertain.”<sup>3</sup> In the *City of Ferndale* decision, immediately following BNSF’s selected excerpts, the Commission goes on to say:

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 the closure of the Thornton Road crossing.

As described earlier in that order, testimony presented by the City included its draft transportation plan (which had not yet been submitted to or acted upon by the city council), the expenses involved in constructing various road extensions or over-grade crossings, and the City’s “hopes” for eventual funding of improvements to Thornton Road, an aspiration which had been in the City’s plans for at least two decades. The Commission noted that its order “considers traffic flow options only to the extent that they are relevant to the public need for the crossing.”<sup>4</sup>

11 Significantly, the Commission’s order in *City of Ferndale* did not criticize the hearing process which admitted a wide variety of evidence that clearly could not be characterized solely as pertaining to current and directly foreseeable public use of the crossing. Instead, the Commission reviewed and considered all potentially relevant evidence and then assigned the appropriate weight to each item and to each witness.<sup>5</sup> In the *City of Ferndale* case, the municipality’s plans for traffic flow and its options for making use of the crossing in the future were found to be aspirational and

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<sup>3</sup> See BNSF Motion to Limit the Scope of the Subject Matter Before the Commission, at 6, quoting from *BNSF v. City of Ferndale*, Docket No. TR-940330.

<sup>4</sup> *BNSF v. City of Ferndale*, at Section C, “Public Need for the Crossing.”

<sup>5</sup> Similarly, *Northern Pacific Railway Co. v. Department of Public Works*, 144 Wn. 47, 256 P. 333 (1927), shows that the Commission’s predecessor was willing to hear evidence of not only current public need, but also future public need. After hearing all of the evidence with regard to the current *and* projected future need for extending existing certificates of convenience and necessity to several motor coach companies, the Department of Public Works included in its findings a listing of each of the construction projects already underway in the region or assumed to begin in the very near future. DPW’s findings went on to explain their relevance to the need for expanded transportation services. It is worth noting that DPW’s findings also conceded that “it is impossible at this time to determine the amount of local service necessary between Easton and Cle Elum, Wash,” and refused to make further findings as to speculative future use and needs. The Washington Supreme Court upheld DPW’s public convenience and necessity findings as applicable to the (then) present time and within the agency’s statutory mandate.

therefore largely irrelevant to the present public need in that matter. In this case, the Commission will afford itself the same opportunity to weigh all relevant evidence with regard to the public's current needs and conveniences.

- 12 The City of Mount Vernon seeks to expand the scope of the issues in this matter to include “broader public policy” issues, specifically the GMA. The City also relies on the *City of Ferndale* case, apparently because of its references to state (and federal) policy referring to creation of a high-speed rail corridor passing through western Washington.<sup>6</sup> The City contends that consideration of the rail transportation policy in *City of Ferndale* supports in this instance the submission of evidence concerning policies contained in the GMA, including not only multimodal transportation systems, but also preservation of agricultural lands and protection of critical areas.
- 13 The City's position stretches *City of Ferndale* too far. In that case, the “broader public policy” issues considered directly related to rail transportation. Here, as previously noted in Order 01, “despite the tangential relevance of the potential impacts of closure of this grade crossing on regional land use planning efforts under the Growth Management Act (GMA), expanding the issues to be litigated before the Commission in this matter to include those best taken up by a Growth Management Hearings Board cannot be justified under the governing statute or under prior Commission actions.”<sup>7</sup> Transportation plans and policies developed under the GMA could prove relevant to the issue in this matter, but presentation of other portions of local or regional land use plans would likely take the Commission too far afield of its statutory authority and thus be inadmissible.
- 14 As stated in Order 02, the City and the County can present evidence of their plans for use of Hickox Road and, as explained above, appropriate weight will be assigned dependent on whether those plans are directly foreseeable or simply hopes.
- 15 **COMPLIANCE WITH STATE ENVIRONMENTAL POLICY ACT (SEPA).** The County's Motion for Summary Judgment contends that the Washington State Department of Transportation (WSDOT) failed to comply with SEPA and that the

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<sup>6</sup> See Respondent Motion for Summary Judgment and In Limine, at 12.

<sup>7</sup> See Order 01, ¶ 9.

Commission must prepare its own threshold determination prior to going forward to consider BNSF's petition.

- 16 Chris Rose, the Commission's Director of Regulatory Services and SEPA responsible official, previously filed a letter in this matter on July 20, 2007, indicating that WSDOT is the appropriate lead agency for the proposed siding extension project. Further, Mr. Rose indicated his recommendation that WSDOT complete a supplemental environmental checklist and, if necessary, an environmental impact statement (EIS) to specifically address potential impacts of the proposed closure of the grade crossing, to include potential traffic impacts and mitigation measures.
- 17 Following arguments on the City's Motion for Summary Judgment, in a letter dated September 25, 2007, WSDOT indicated its intent to withdraw its SEPA Determination of NonSignificance (DNS) and issue a new SEPA decision, in conjunction with a new notice and comment period. WSDOT noted that it would do so "regardless how Judge Torem may rule on the motions that are currently pending."
- 18 The City's Motion for Summary Judgment asked the Commission to deny the petition for closure until SEPA is "complied with including WUTC removing WSDOT's previous threshold determination based on inadequate review and new information." Given WSDOT's withdrawal of its previous DNS and intent to promptly issue a new threshold determination, the City's Motion for Summary Judgment is now moot and must be denied, without prejudice.
- 19 Even if WSDOT had not agreed to issue a new SEPA determination, the City's Motion for Summary Judgment failed to articulate any jurisdictional basis for the presiding officer or for the Commissioners themselves to act in an appellate authority of another agency's SEPA determinations. Therefore, even if not made moot by WSDOT's subsequent actions, the City's Motion for Summary Judgment and the relief sought could not have been granted.

**ORDER**

THE COMMISSION ORDERS:

- 20 (1) BNSF's Motion to Limit the Scope of the Subject Matter Before Commission  
is denied.
- 21 (2) The City of Mount Vernon's Motion In Limine and its Motion for Summary  
Judgment are also denied.

Dated at Olympia, Washington, and effective October 2, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM  
Administrative Law Judge