

NOV 18 1994

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

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BURLINGTON NORTHERN RAILROAD COMPANY,)	
)	
Petitioner,)	DOCKET NO. TR-940330
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
CITY OF FERNDALE, WASHINGTON,)	AND INITIAL ORDER
)	GRANTING PETITION
Respondent.)	
)	
.)	

Hearings were held in this matter in Ferndale on October 12 and 13, 1994, before Administrative Law Judge Lisa A. Anderl of the Office of Administrative Hearings. The parties filed briefs by November 7, 1994.

The parties appeared and were represented as follows:

- PETITIONER: BURLINGTON NORTHERN RAILROAD CO.
 By Rexanne Gibson, attorney
 110 - 110th Ave. NE, Suite 670
 Bellevue, Washington 98004

- RESPONDENT: CITY OF FERNDALE
 By Gary Cuillier, attorney
 P.O. Box 1126
 Ferndale, Washington 98248

- COMMISSION: WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
 By Ann Rendahl, assistant attorney general
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 P.O. Box 40128
 Olympia, Washington 98504-0128

MEMORANDUM

Proceedings

This case concerns the proposed closure of the Thornton Road railroad crossing in the City of Ferndale. On March 10, 1994, Burlington Northern Railroad Company (Burlington or the railroad) petitioned the Commission for closure of this crossing,

stating that the proposed Amtrak (passenger train) service through Ferndale will require an extension to the siding track at Thornton Road. The extended siding would be used to store freight trains while the passenger trains pass on the main track and the crossing could be closed or blocked for up to an hour during these movements. The petition further stated that the property which is accessed by Thornton Road is being acquired by the State of Washington and that the crossing will no longer be necessary to serve those properties. Commission Staff supports closure of the crossing as required by the public safety.

The closure was protested by the City of Ferndale and the matter was set for hearing. On October 3, 1994, the Commission consolidated this case for hearing with Docket No. TR-940308, the joint petition of Burlington, Amtrak, and the Department of Transportation for an increase in passenger train speed limits through the City of Ferndale. Hearings were held in Ferndale on October 12 and 13, 1994, at which all of the parties and members of the public testified. The matters were not consolidated for decision and order, but the Commission did authorize the administrative law judge to rule on further motions regarding consolidation.

Post-Hearing Briefs and Motions

The parties filed briefs by November 7, 1994. The petitioner requested that separate orders be entered in these dockets, and that request is granted.

The City of Ferndale filed, along with its brief, a petition to reopen the record to permit additional evidence for the purpose of determining whether an alternative location for the proposed siding exists and should be considered by the petitioner. The City submitted an affidavit from Stan Strebel, the City Manager, in support of the petition. In general, the affidavit suggests that there is another location to the north of the city which would be suitable for an 8500' siding track and that this location should be considered if the City's concerns are to be accorded any weight at all.

Burlington Northern and Commission Staff filed answers to the petition on November 10, 1994, opposing the request to reopen. No request to file a reply was made or granted.

Reopening is authorized under RCW 81.04.160 and WAC 480-09-820(2). In accordance with that regulation, reopening may be requested after the close of the record and before a final order. The petition in this case was thus timely filed.

The rule further states that reopening may be granted in contested proceedings to permit receipt of evidence which is essential to a decision and which was unavailable and not

reasonably discoverable at the time of the hearing, or for any other good and sufficient cause. WAC 480-09-820(2)(b).

In this case, the evidence proposed for receipt into the record is neither essential to the decision nor was it unavailable at the time of hearing. The evidence concerns whether there are other viable sites for a siding/passing track. The Commission does not require such information to decide whether Thornton Road should be closed. Indeed, the City has not presented any argument or citation to establish that this issue is properly within the purview of the Commission in this type of proceeding. As discussed below, the issues in this case concern whether there are alternative means of public access if the crossing is closed, not whether the railroad has alternatives to constructing the siding track in a particular location.

Finally, the City does not offer any reasons why this information, even if it were relevant, was not presented at the hearing. The railroad's decision to site the siding track in Ferndale was discussed extensively on the record. Burlington presented detailed testimony on the various factors, including environmental and economic considerations, which influenced the choice of location. The evidence proposed by the City in response to the railroad's testimony was both available and discoverable at the time of hearing in this matter and thus does not support reopening. The petition to reopen is denied.

The Crossing

The crossing at Thornton Road is a double set of tracks, protected by stop signs and crossbucks. Thornton Road runs east/west and crosses the north/south tracks at right angles. The tracks run west of and parallel to I-5 through this area of town. Thornton Road currently dead-ends shortly after crossing the tracks, west of I-5. The crossing, as described through testimony at the hearing, currently serves two property owners, both of which are residences. The petitioner proposes to either build an access road for those properties or to allow access through the crossing only for the property owners. Under this latter situation, Thornton Road would be gated to the west of the tracks and only property owners would have access. A map of the city, showing the crossing, is attached as Attachment A.

The tracks at Thornton Road are a mainline track and a siding track. Burlington proposes to extend its existing siding track north another 3,631 feet, to a total length of 8,600 feet. This length is necessary for the track to be used as a passing track when passenger trains come through. Burlington will store its freight trains on this siding track to allow the Amtrak to come through on schedule. Freight trains are generally about 7,000 feet long and could not be stored on the existing siding. The extended siding will be long enough that a freight train

could be pulled far enough north to be out of the grade crossings in the main part of town -- Washington Street and Second Avenue. A freight train could be on the siding for one hour or more.

If Thornton Road remains open as a public crossing, the railroad would have to split the train while it waits on the siding. This is a time consuming process and presents an additional hazard at the crossing because of train movements across the tracks at grade and because a stopped train can impair sight distance, already limited at this crossing. A vehicle, after stopping, would have to creep out towards the tracks to see if a train was coming. Train speeds, especially with fast trains viewed head on, are extremely difficult to judge and a passenger train approaching at 79 m.p.h could be a significant hazard at an unprotected crossing.

Thornton Road is a 25 m.p.h. city street, with one lane of travel in each direction and no curbs or sidewalks. It is the main east/west street in the north part of the city, and it serves many residents who have settled in the subdivisions which are growing rapidly in the northwest part of the city. Using Thornton, they are able to access Vista Drive or Malloy Drive and travel south into the business district. This route is also the main access to I-5, for both north and southbound traffic. Closure of the crossing would not affect the current traffic patterns.

Public Need for the Crossing

The City is in the process of planning for growth and development over the next 15-20 years. As part of that plan, the City is considering extending Thornton Road southward from where it now dead-ends. Under the plan, Thornton would connect with Portal Way, immediately to the south of the freeway ramps which allow exit from and entrance to southbound I-5. This proposal is illustrated in exhibit #4. The City and the residents feel that the future proposed use of Thornton Road is critical to draw traffic onto I-5 without first going through the center of town, which is already fairly congested during peak traffic times.

The City has other options to developing Thornton Road at grade, including an over-grade crossing which would also cross over I-5 and connect with Newkirk Road to the east of the freeway. The City's transportation consultant recommends the Thornton Road extension as the least expensive option, although perhaps not the best for long term growth and traffic needs. Costs of the various options are uncertain, with an overpass estimated at \$6 million and the extension at \$4 million (\$2 million for construction and \$2 million in mitigation costs). The City has no money for any of the options, but hopes to eventually fund construction with a combination of State/Federal highway funds and money it is now collecting in growth mitigation

3. On October 3, 1994, this petition was consolidated for hearing with the joint petition of Burlington, Amtrak and the Washington State Department of Transportation (WSDOT) for an increase in passenger train speed limits through Ferndale. The petition to close the crossing is tied to the increased speed limits, as passenger train operations on the Burlington tracks will affect the traffic over and use of the crossing.

4. The following witnesses appeared for the petitioner: Wayne Hatton, vice-president of transportation for Burlington; Kenneth Cottingham, consulting transportation engineer; Robert Scieszinski, supervisory specialist for signal and train control with the Federal Railroad Administration; Russell Frazier, manager of signal maintenance for Burlington; James Kime, manager of operating practices for Burlington; Marvin Nelson, senior manager of engineering for Burlington. In addition, the petitioners in Docket TR-940308 presented the following witnesses, whose testimony was also considered in this matter: Alden Clark, senior director of contract operations for Amtrak; Edward Quicksall, transportation manager for western division #710 for Amtrak; Robert Josephson, manager of local planning and coordination for the WSDOT; Gilbert Mallery, rail branch manager for the WSDOT.

5. The City called the following witnesses in opposition to the petition to close the Thornton Road crossing: Yvonne Goldsmith, City council member; Darrell Ashe, City council member; John Eley, director of public works for the City; Michael Birdsall, consultant in transportation planning; Stan Strebel, City manager. The City does not oppose the petition to increase passenger train speed limits.

6. Commission Staff called the following witnesses in this matter: Allen Dickson, motor carrier law enforcement investigator; Gary Harder, rail carrier compliance specialist; Alan Scott, rail section operations manager.

7. Members of the public spoke in favor of keeping Thornton Road open as one of the City's main options for improving traffic flow within the city limits. Most public witnesses favored a grade crossing at Thornton, but some had no preference between a grade crossing or an over crossing. A few expressed support for high speed rail transportation and Amtrak's proposed service, including the higher speed limits. Others felt that the current 50 m.p.h. speed limit was fast enough and that 70 or 79 m.p.h. through the corporate limits is just too fast.

8. The City has a draft transportation plan which will likely be submitted to and acted on by the City council this year. The plan contains several options for improving traffic flow through town. One of those options is the construction of an extension to Thornton Road southbound to connect with Portal

Way near the southbound ramps to and from I-5. This option has been in the City's plans for many years, often as a high priority item. The City has never been able to obtain any funding for this project and does not have good prospects of obtaining such funding in the future. The City would like to see Thornton Road remain open because it believes that this project is the least expensive option and because the project could be completed incrementally, without a large expense all at once. The estimate of the total cost of construction is about \$4 million. Another option, an overpass over the tracks and I-5, is estimated to cost \$6 million.

9. During floods, water blocks access to and from Ferndale over many of the main streets. The proposed Thornton Road extension is located in a flood storage area. The extension would intersect with Portal Way within 80 feet of the freeway interchange, making traffic very congested at that intersection and virtually un navigable by big trucks turning left from Thornton onto Portal and left again onto the ramp to I-5. The area through which the new road would go is planned as manufacturing or industrial, with likely use by large vehicles if the extension is built.

10. Commission Staff supports the petition to close Thornton Road, but argues that the closure should be conditioned upon the railroad providing access for properties which would be otherwise landlocked and providing a crew member to flag traffic over the crossing while the train is split.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this application.

2. Pursuant to RCW 81.53.060, a railroad crossing at grade may be closed upon petition of the railroad company if the public safety requires such closure.

3. The grade crossing at Thornton Road in the city of Ferndale is dangerous and is not required by the public convenience and necessity. The petition of Burlington Northern Railroad Company for closure of this crossing should be granted, on condition that the railroad provide access to those properties located to the east of the tracks which would be landlocked by the closure, including the use of a crew member to flag traffic across when a train is split at the crossing.

O R D E R

IT IS HEREBY ORDERED That the petition of Burlington Northern Railroad Company for closure of the at-grade crossing at

allow those property owners to continue to use the tracks as a private crossing.¹

As noted above, there was extensive testimony about the City's potential or future need for the crossing. This order concludes that only the present public need should be considered in determining whether to close a crossing. Where the legislature has considered future need to be a relevant consideration, that has been stated. See, for example RCW 81.80.070 in which the Commission was directed to consider the present or future public convenience and necessity in a grant of motor carrier authority. In addition, as pointed out by Commission Staff, the City is always entitled to petition the Commission to open a grade crossing, should the public need for it arise.

Finally, even if future need for the crossing were a relevant consideration, this initial order would not be persuaded that the likely future use of the at grade crossing is anything more than speculative and highly uncertain.²

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 closure of the Thornton Road crossing.

Other Issues

In addition to the safety and public need issues discussed above, the City argues two other points. First, that the railroad should be required to consider an alternate location for its siding track. Second, that an order closing the crossing would contravene the Growth Management Act, RCW 36.70A.103.

¹ Commission Staff supports the railroad's petition, but on brief suggests that a crew member flag traffic at the crossing when a train is split to allow access to the private properties. Since a crew member will have to be at the crossing to split and reconnect the train, this seems like a reasonable additional safety precaution and will be recommended by this order.

² If this order were to consider future use of this crossing, with Thornton Road as a through street, higher traffic volumes would have to be assumed. Higher traffic volumes would increase the danger at Thornton Road, as the crossing has neither lights nor gates and has limited sight distance.

As noted above, the City cites no authority for the proposal that an alternate location for the siding track is an issue which could be decided in the scope of this proceeding or even within the Commission's jurisdiction. For the reasons discussed in the section of this order denying the petition to reopen, this issue will not be given further consideration.

RCW 36.70A.103 provides, in general terms, that actions of State agencies may not contravene comprehensive plans adopted in accordance with the Growth Management Act. However, Ferndale has not adopted a comprehensive plan, so this argument has no bearing on this case.

Conclusion

This order concludes that the at-grade crossing at Thornton Road in the city of Ferndale should be closed in the interest of public safety. This conclusion is based on the dangerous nature of grade crossings in general, the fact that this crossing will soon experience increased use as a passing track, the switching activity which will occur over the crossing, and the absence of present public need for the crossing.

Having discussed above in detail both the oral and documentary evidence concerning all material matter, and having stated findings and conclusions, the undersigned Administrative Law Judge now makes the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings are incorporated herein by this reference.

FINDINGS OF FACT

1. On March 10, 1994, Burlington Northern Railroad Company (Burlington or the railroad) petitioned the Commission for closure of the Thornton Road crossing in the city of Ferndale. The grade crossing has two tracks, a mainline and a siding track. The siding track will be extended to the north and will see increased use as a passing track with the start of passenger train service between Seattle and Vancouver, B.C. in 1995.

2. The Thornton Road crossing is protected by stop signs and crossbucks. It currently sees freight train use, operating at maximum speeds of 50 m.p.h. By spring of 1995, two passenger trains per day will operate through the crossing at speeds up to 79 m.p.h. Thornton Road is an east/west street. The railroad tracks run north/south, roughly parallel to and to the west of I-5. Thornton Road dead-ends between the tracks and I-5. The crossing currently serves two residences. The petitioner will provide access to those residents if the petition is granted.

fees. Some type of extension of Thornton Road, either to the south or the east, has been in the City's plans since at least 1972.

Much time at the hearing was spent discussing the various options for restructuring traffic flow through the city. In addition, various expert opinions were offered on the Thornton Road extension, including the opinion that the resulting intersection with Portal Way would be unworkable because of the proximity to the freeway ramps. However, this initial order does not need to decide the best plan for the City to follow -- that is uniquely the province of the City government. This order considers traffic flow options only to the extent that they are relevant to the public need for the crossing.

Policy Considerations

In 1992 the Federal Railway Administration designated a high speed rail corridor between Eugene, Oregon and Vancouver, British Columbia. The petitioners argue that the crossing will become even more dangerous with the operation of a high-speed passenger train service between Seattle and Vancouver, B.C. This service is proposed to start in 1995, and it is because passenger trains will have the right of way on the track that Burlington must use the siding track for its freight trains.

State policy supports the operation of the passenger service. In 1993 the Washington State Legislature enacted Chapter 47.79 RCW which established a high-speed ground transportation program. The program's stated goals include the implementation of high-speed ground transportation service offering top speeds over 150 m.p.h. between Everett and Vancouver, B.C. by 2025. RCW 47.79.020(2). In addition, as discussed below, public policy disfavors crossings at grade.

Finally, petitioners argue that closing the crossing is consistent with the policy contained in the Federal Railroad Administration's Rail-Highway Crossing Safety / Action Plan Support Proposals (exhibit 12). That document notes that the following criteria have been useful in determining when crossings should be consolidated: consolidate where there are more than four per mile in urban areas and one per mile in rural areas and alternate routes are available; consolidate crossings with fewer than 2000 vehicles per day and more than two trains per day and an alternate route is available; link construction work with eliminations, especially when upgrading rail corridors for high speed trains; when improving one crossing, consider eliminating adjacent crossings and rerouting traffic; eliminate complex crossings where it is difficult to provide adequate warning devices or which have severe operating problems (e.g. multiple tracks, extensive switching operations, long periods blocked, etc.)

Petitioners point out that these conditions are all present at the Thornton Road crossing and support an order to close the crossing.

Issue

Does the public convenience and need for the crossing outweigh public safety concerns and the public policy against crossings at grade?

Discussion

Burlington has requested closure of the crossing and this position is supported by Commission Staff. The City of Ferndale opposes closure, as do most of the public witnesses who testified.

The issue, in accordance with the standard set forth in RCW 81.53.060, is whether the public safety requires that the crossing be closed. This is an at-grade crossing, so the analysis starts with the premise that the crossing is dangerous. The courts and the Commission have held that all railroad grade crossings are dangerous and that public policy disfavors crossings at grade. Tonasket v. Burlington Northern, Docket No. TR-921371 (December 9, 1993). However, in some cases the public convenience or need for the crossing outweighs the inherent danger, and in that case a crossing may remain open. The test was stated by the court in Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949) as follows:

Having found that the grade crossing herein is dangerous and unsafe, we must also consider the convenience and necessity of those using the crossing and whether the need of the crossing is so great that it must be kept open notwithstanding its dangerous condition.

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.

This initial order finds that there is no present public need or convenience which is served by the grade crossing at Thornton Road. At most there is a private need for the residences on the east side of the tracks, and Burlington will

Thornton Road in the City of Ferndale is granted, on condition that the railroad provide access to those properties located to the east of the tracks which would be landlocked by the closure, including the use of a crew member to flag traffic across when a train is split at the crossing.

DATED at Olympia, Washington, and effective this 18th day of November, 1994.

OFFICE OF ADMINISTRATIVE HEARINGS



LISA A. ANDERL

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(3). As provided in WAC 480-09-780(4), 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, under 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 as 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.

BROWN R.I

ATTACHMENT A

Ferndale, WA

1 mile

Base Map: US Census Bureau TIGER/Line Map
Railroad Information: BN Database
Proposals shown in magenta

Extend siding 3,631'
New Passing Track = 8,600'

MP 107.48
REMOVE SWITCH

CLOSE THORNTON STREET CROSSING

CONSTRUCT ACCESS ROAD

JTC
 Cause No. TR-940308
 Exhibit # 4
 Witness stipulated
 10-12-94

Ferndale

106.80
084830P
PUB & GRADE
WILSON RD
C021300

507 1750
MP 108.3

MP 108.18

1000

107.07
084830P
PUB & GRADE
THORNTON DRIVE
C021560

MP 107.07

MP 108.01

MP 108.14

MP 108.25

MP 108.20

MP 108.21

MP 108.17

MP 108.14

104.21
084837H
PUB & GRADE
WASHINGTON AVE
CITY ST

507 1750
407 185
MP 108.2

106.02
084838B
PUB & GRADE
2ND ST
CITY ST

100.90
084837H
PUB & GRADE
FRONT ST
CITY ST

100.80
084837H
PUB & GRADE
WOCKLACK RIVER

105.73
084837H
PUB & GRADE
LATCH ROAD
FROM 1000

507 1750
507 185
MP 108.1

105.09
084831S
PUB & GRADE
HOWARD RD
C021340