

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY CO.

Petitioner,

v.

SNOHOMISH COUNTY,

Respondent.

DOCKET TR-090121

COMMISSION STAFF'S RESPONSE TO  
BNSF'S PETITION FOR  
ADMINISTRATIVE REVIEW

1 Staff agrees with the changes that BNSF proposes to the wording of the initial order's conditions.

2 Staff is convinced that it would be impractical to keep the Logen Road crossing open to through traffic during the construction of a cul-de-sac turnaround at the new dead-end of Logen Road east of BNSF's tracks. Staff is confident that any motorist who might mistakenly drive down Logen Road during the construction period, intending to cross the tracks from east to west, will be able to use other means to turn around, such as an existing driveway on Logen Road.

3 Staff also agrees that traffic analysis shows that the small number of motorists who currently use Logen Road crossing will divert almost entirely to the 271<sup>st</sup> Street NW crossing south of Logen Road in Stanwood and not to 300<sup>th</sup> Street/Dettling Road crossing to the north (or for that matter, to 102<sup>nd</sup> Street, even farther to the north of Logen Road).

Although Mr. Logen suggested at hearing that, if Logen Road crossing were closed, he

might have to use the 300<sup>th</sup> Street crossing as the closest alternative for driving his family's tractor between his brother's property and his mother's property, his concerns regarding the safety of that route did not pertain to the 300<sup>th</sup> Street crossing itself in its current configuration. (Since the installation of lights and gates at that crossing, there have been no accidents.) The primary reason for the improvements to 300<sup>th</sup> Street/Dettling Road is the construction of the new siding through that crossing, not to accommodate any small increment of additional traffic that may be divert to 300<sup>th</sup> from Logen Road.

4           Although Staff agrees with BNSF's suggested changes to the initial order's conditions, Staff finds BNSF's federal preemption argument unnecessary and too broad in its implications. State authority over conditions at railroad grade crossings is a well-established carve-out from federal preemption under the Interstate Commerce Commission Termination Act and the Federal Railroad Safety Act. *See, e.g., Iowa, Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557 (8<sup>th</sup> Cir. 2004); *Home of Economy v. Burlington Northern*, 694 N.W.2d 840, 846-47 (ND 2005) (ICCTA does not preempt state law regarding grade crossings). There could well be a set of circumstances where closing a crossing would result in a substantial amount of traffic being forced to use an adjacent crossing that is deficient in some respect or not adequate for the additional traffic. In such a case, the public safety might require that improvements be made at the alternative crossing before the existing crossing could safely be closed and traffic diverted to that new crossing. *See* RCW 81.53.060. In such a case, the commission would surely not be preempted from requiring improvements to be made prior to closure of the existing crossing, even if there was some burden on the railroad's preferred construction schedule.

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DATED this 19<sup>th</sup> day of Nov., 2009.

Respectfully submitted,

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read 'J. Thompson', written over a horizontal line.

JONATHAN C. THOMPSON  
Assistant Attorney General  
Counsel for Washington Utilities and  
Transportation Commission Staff