

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,

Petitioner,

v.

WHATCOM COUNTY,

Respondent.

DOCKET TR-150189

**POST-HEARING BRIEF
ON BEHALF OF COMMISSION STAFF**

January 8, 2016

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I. INTRODUCTION

1 As part of its Intalco Yard expansion project, BNSF Railway Company proposes to extend an existing siding track over Valley View Road in rural Whatcom County. BNSF claims this work “will allow existing customers in the Cherry Point industrial area to receive and depart full length trains without blocking the main line, switches or roads.”¹

2 The siding extension will create a double-tracked grade crossing at Valley View Road. Because the siding and main line will be used for meet-and-pass purposes, BNSF predicts that the Valley View crossing will be blocked for “prolonged periods of time.”²

3 In February 2015, BNSF petitioned the Washington Utilities and Transportation Commission to close the Valley View crossing.

4 Commission Staff supports BNSF’s petition. The legal issue is whether public safety requires the crossing’s closure. Historically, the Commission has analyzed this issue by balancing public need against public safety. Because the evidence in this docket shows that the crossing poses an unjustified safety risk (assuming completion of the Intalco Yard expansion project), Staff contends the crossing should be closed.

5 Whatcom County opposes BNSF’s petition but presented very little evidence justifying its opposition. The county’s primary concern appears to be the propriety of the SEPA threshold determination issued for the Intalco Yard expansion project in November 2015 by the Department of Ecology. That issue is outside the scope of this proceeding.

6 Dozens of public witnesses spoke or wrote against BNSF’s petition.³ Public comments, however, are treated as illustrative exhibits (as opposed to substantive evidence).

¹ Petition at 5; *see* Exh. No. RW-1T at 3:23-4:5 (describing scope and purpose of Intalco Yard project).

² Petition at 5.

³ Exh. No. B-1; Transcript Vol. III (Dec. 1, 2015).

No public witness offered formal testimony on behalf of Whatcom County (presumably because the county did not solicit such testimony).

7 In the final analysis, the evidentiary record contains only scant evidence of public need. On balance, risk outweighs need. The Commission should close the crossing.

II. FACTS

8 Valley View Road is a two-lane county road located in rural Whatcom County.⁴ The road has no curbs or sidewalks.⁵ The posted speed limit is 50 miles per hour.⁶

9 The Valley View crossing is currently equipped with shoulder-mounted flashing lights and gates.⁷ No accidents have been reported at the crossing in the past ten years.⁸

10 On a typical day, BNSF trains make a total of eight trips over the crossing.⁹ These trains travel approximately 10 MPH.¹⁰ No passenger trains use the crossing.¹¹ Average annual daily vehicle traffic over the crossing is approximately 364 vehicles.¹² Commercial vehicles make up approximately eight percent of average daily traffic.¹³

11 If the Commission closes the Valley View crossing, vehicular traffic will re-route over one of two alternative grade crossings: the Ham Road crossing and the Main Street crossing.¹⁴ Ham Road is a two-lane county road with a posted speed limit of 35 MPH.¹⁵ The distance between the Valley View crossing and the Ham Road crossing is approximately 1.3

⁴ Exh. No. PC-1T at 5:3-7.

⁵ Exh. No. PC-1T at 5:7.

⁶ Exh. No. PC-1T at 5:7-8.

⁷ Exh. No. PC-1T at 5:9-10.

⁸ Exh. No. PC-1T at 6:16.

⁹ Transcript Vol. II at 32:13-23 (Dec. 1, 2015) (Grant Haag); *id.* at 59:9-14 (Paul Curl).

¹⁰ Exh. No. PC-1T at 5:11-12.

¹¹ Exh. No. PC-1T at 5:12.

¹² Exh. KB-2T at 2:9-17; *see* Exh. No. JR-1T at 2 (“We [Whatcom County] are satisfied that the most recent information submitted by BNSF (Exh. No. KB-3) for the traffic counts is fairly accurate.”).

¹³ Exh. No. PC-1T at 5:19-20.

¹⁴ Exh. No. PC-1T at 13:19-14:9, 19:9-15, 23:5-8.

¹⁵ Exh. No. PC-1T at 14:8-9.

miles.¹⁶ Main Street is a two-lane road in Custer, Washington, with a posted speed limit of 25 MPH.¹⁷ The distance between the Valley View crossing and the Main Street crossing is approximately 1.2 miles.¹⁸

12 The closure of the Valley View crossing is one component of BNSF's Intalco Yard expansion project.¹⁹ According to BNSF witness Richard Wagner, this project "will allow trains to meet and pass, and [allow] for existing customers in the Cherry Point industrial area to receive and depart full length trains without blocking the main line, switches or roads."²⁰

13 The project's primary component is the extension of a siding track that currently terminates to the west of Valley View Road.²¹ Once extended, the siding will intersect Valley View Road parallel to the main line, creating a double-tracked crossing.

14 Mr. Wagner testified, "The siding track currently is too short to accommodate most trains without having to break [the] train to store some [cars] elsewhere and/or block the mainline track. The project will extend the existing siding track increasing the capacity to 7,230 feet [approximately 1.4 miles]."²²

15 Because the extended siding's western terminus will lie to the east of Ham Road, BNSF anticipates that trains parked on the extended siding will never block the Ham Road grade crossing.²³ BNSF confirmed at the December 1 hearing that the extended siding will be sufficiently long to accommodate all trains currently operated by the company.²⁴

¹⁶ Exh. No. PC-1T at 14:3-4.

¹⁷ Exh. No. PC-1T at 19:14-15.

¹⁸ Exh. No. PC-1T at 19:10-11.

¹⁹ Exh. No. RW-1T at 3:23-27.

²⁰ Exh. No. RW-1T at 3:24-26.

²¹ Exh. No. RW-1T at 3:23-24.

²² Exh. No. RW-1T at 5:3-5.

²³ Transcript Vol. II at 22:14-24:23 (Dec. 1, 2015) (Richard Wagner); *id.* at 33:11-14 (Grant Haag).

²⁴ Transcript Vol. II at 23:15-19 (Dec. 1, 2015) (Richard Wagner); *id.* at 33:1-10 (Grant Haag).

III. ARGUMENT

A. Legal Standard

1. RCW 81.53 Calls for a Broad, Flexible Balancing Test

16 BNSF’s petition comes before the Commission under RCW 81.53.060, which allows
railroad companies to allege that “public safety requires . . . the closing or discontinuance of
an existing highway crossing.” If the Commission agrees that public safety so requires, it
may permanently close the crossing.²⁵

17 Historically, the Commission has used a balancing test to evaluate whether public
safety “requires” closure in a given case. The Commission’s basic aim is to determine
whether public need for the crossing—defined broadly—is sufficient to justify whatever
level of risk the crossing presents.

18 Because the Legislature provided no statutory criteria to guide the Commission’s
decision-making process, the Commission has implied statutory authority to consider all
relevant evidence that is supported by the evidence.²⁶ The Commission thus has broad
discretion to make the best decision possible, based on the totality of the circumstances
presented by each unique proposal.

19 The lone judicial opinion construing RCW 81.53.060 supports a broad reading of the
Commission’s authority. In *Department of Transportation v. Snohomish County*,²⁷ our

²⁵ RCW 81.53.060, .070.

²⁶ See, generally, *Brown v. Vail*, 169 Wn.2d 318, 330, 237 P.3d 263 (2010) (“[I]mplied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature.”); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975) (“It is . . . valid for an administrative agency to ‘fill in the gaps’ via statutory construction—as long as the agency does not purport to ‘amend’ the statute.”); *Dep’t of Labor & Indus. v. Rowley*, 185 Wn. App. 154, 165, 340 P.3d 929 (2014) (“While not controlling, the construction and application of a statute by an administrative agency charged with its enforcement often provides a valuable aid to the courts and should be given great weight. This includes consideration of how the agency ‘fill[ed] in the gaps’ to effect a general statutory scheme . . .”).

²⁷ 35 Wn.2d 247, 212 P.2d 829 (1949).

Supreme Court acknowledged that “the legislature delegated very wide powers to the public service commission with regard to railroad and highway crossings.”²⁸ The Court upheld the agency’s closure decision based primarily on the fact that “the department fully considered the testimony in the case and, under the law, exercised its honest judgment in disposing of it.”²⁹ Modernly, the concepts of “full consideration” and “honest judgment” are addressed by the Administrative Procedure Act. Under the APA, the Commission’s decision must be (1) supported on substantial evidence, and (2) non-arbitrary.³⁰

2. Past Agency Practice Also Supports a Broad, Flexible Analysis

20

Although prior agency decisions are not strictly binding, past practice may be informative.³¹ In the recent *Yakima* docket, Administrative Law Judge Rayne Pearson characterized the Commission’s practice in closure dockets as a “comprehensive analysis that begins with a two-part inquiry.”³² She described the inquiry as follows:

First, we examine whether a crossing is especially hazardous such that public safety requires it to be closed. If the answer is affirmative, we next determine whether the public need for the crossing is so great that the crossing should be kept open notwithstanding its dangerous condition. . . . If, however, the evidence fails to show that a crossing is especially hazardous, the Commission need only decide whether the inherent danger of the crossing, balanced with public convenience and necessity, warrants its closure.³³

²⁸ *Id.* at 250.

²⁹ *Id.* at 259.

³⁰ RCW 34.05.570(3)(e), (i).

³¹ Our Supreme Court has noted that “stare decisis plays only a limited role in the administrative agency context.” *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 173 n.9, 256 P.3d 1193 (2011) (quoting *Vergeyle v. Dep’t of Emp’t Sec.*, 28 Wn. App. 399, 404, 623 P.2d 736 (1981)). Agencies are required only to “strive for equality of treatment.” *Id.*

³² *BNSF Railway Co. v. Yakima County*, Dockets TR-140382 and TR-140383, Initial Order 03 Denying Petitions ¶ 25 (Aug. 18, 2015).

³³ *Id.* ¶¶ 25, 28 (Aug. 18, 2015) (citations omitted).

This inquiry boils down to a single question: Does public need justify the crossing's risk? Logically, crossings that are "especially hazardous" will require a relatively stronger justification. Crossings that are less hazardous will require a relatively lesser justification.

21 In the past, the Commission has considered certain factors to help establish relative levels of risk and public need. In the *Yakima* docket, Judge Pearson stated that any number of the following factors may be used to establish risk:

- 1) the presence of vegetation or other obstacles that limit visibility on the approach;
- 2) the roadway crosses the crossing at an oblique angle (other than 90 degrees);
- 3) limited holding capacity on approaches between the railroad right of way and the streets that intersect;
- 4) more than one mainline track at the crossing; and
- 5) the presence of siding track in addition to mainline track.³⁴

On the other side of the scale, the following factors may be used to establish public need:

- 1) the amount and character of travel on the railroad and on the highway;
- 2) the availability of alternate crossings;
- 3) the number of people affected by the closure;
- 4) whether there are readily available alternate crossings in close proximity that can handle any additional traffic resulting from the closure; and
- 5) whether the alternative crossings are safer than the crossing proposed for closure.³⁵

In the present case, the Commission may consider these factors and any other factors—so long as all factors are relevant and based on record evidence.

22 Ultimately, the Commission's duty is to faithfully execute RCW 81.53.060, which, as we know from the breadth of the statutory language, from the Supreme Court's comments in *Department of Transportation v. Snohomish County*, and from past agency practice, calls for a broad, flexible balancing test weighing public need against risk.

B. Issues Outside the Scope of this Proceeding

23 The following issues are outside the scope of this proceeding: (1) BNSF's decision to complete the Intalco Yard extension project; (2) the commodities carried by BNSF; and

³⁴ *Id.* ¶ 26.

³⁵ *Id.* ¶ 27.

(3) the validity and propriety of the State Environmental Policy Act (SEPA) determination of nonsignificance issued by the Department of Ecology on November 10, 2015.³⁶

1. The Commission Has no Direct Authority over the Intalco Yard Project

24 The Commission—a state agency—has no direct authority over the proposed Intalco Yard extension project. Any attempt to limit the project will be preempted by the federal Interstate Commerce Commission Termination Act, which grants the Surface Transportation Board exclusive jurisdiction over the construction and operation of siding tracks.³⁷

2. The Commission Cannot Prohibit the Transport of Crude Oil

25 As a common carrier, BNSF must transport all types of commodities.³⁸ The Commission has no authority to prohibit BNSF from transporting crude oil.

3. Validity of Ecology’s SEPA Determination of Nonsignificance

26 SEPA is a state law designed to help government agencies understand the potential environmental impacts of their actions. Almost all Commission actions are “categorically exempt” from SEPA’s requirements. Crossing closure adjudications are among the few Commission actions that are expressly subject to the law.³⁹

27 SEPA compliance, however, does not always require action by the Commission. If another agency has assumed “lead agency” status, and that agency issues a threshold determination that obviates the need for an environmental impact statement, that determination is, as a general rule, “final and binding on all agencies.”⁴⁰

³⁶ Exh. No. PB-6.

³⁷ See 49 U.S.C. § 10501(b); see also Exh. No. PC-1T at 13:9-15.

³⁸ See Exh. No. GH-1T at 2.

³⁹ WAC 197-11-865(2).

⁴⁰ WAC 197-11-390(1); see also WAC 197-11-050(2) (“The lead agency shall be the agency with main responsibility for complying with SEPA’s procedural requirements and shall be the only agency responsible for . . . [t]he threshold determination.”).

28

In the present docket, the Commission is not the lead agency. The lead agency is the Department of Ecology, and that agency issued its determination of nonsignificance on November 24, 2015.⁴¹ Because Ecology's determination is final and binding on the Commission, the Commission has no further role to play with respect to SEPA compliance.

C. Balancing Test

29

As stated above, the Commission should resolve BNSF's petition by asking whether, considering the evidentiary record as a whole, the level of risk presented by the Valley View crossing is justified by public need for the crossing. Staff's contends the answer is no.

1. The Valley View Crossing Presents a High Level of Risk

30

The Valley View Crossing is inherently dangerous (all grade crossings are inherently dangerous), and it will become even more dangerous when BNSF begins to block the crossing for lengthy intervals by storing trains on the extended Intalco Yard siding track.

31

Staff witness Paul Curl testified, "The thing that makes this [crossing] particularly hazardous is that the railroad intends to block the crossing for extended periods of time, and that leads to behavior that is unsafe. That's the reason. Not necessarily just the second track, it's the stopping and blocking the crossing that makes it hazardous."⁴²

32

The reconstructed (double-tracked) Valley View crossing will be relatively more hazardous than its current (single-tracked) configuration for several reasons.⁴³ First, trains parked on the siding may block the crossing for lengthy intervals—possibly "hours or more, depending on the customer's needs and other train traffic in the area."⁴⁴ Motorists and

⁴¹ Exh. No. PB-6.

⁴² Transcript Vol. II at 64:20-65:7 (Dec. 1, 2015) (Paul Curl).

⁴³ Exh. No. RW-1T at 6:17-7:11.

⁴⁴ Exh. No. RW-1T at 5:26-6:2; *see also* Exh. No. GH-1T at 6; Exh. No. PC-1T at 28:18-19; Exh. No. KB-3 at 5.

bicyclists may collide with parked train cars, particularly when it is dark or visibility is otherwise diminished.⁴⁵

33 Additionally, individuals who use the crossing will soon learn of the potential for prolonged delays. Some of these individuals, motivated by a desire to “beat the train,” will attempt to maneuver around gates and/or speed through the crossing.⁴⁶ As BNSF witness Steven Neubauer explained, drivers tend to misjudge the magnitude of the risk:

Drivers, pedestrians, and bicyclists may . . . underestimate the potential dangers of a slow-moving train, thinking they have time to try to “beat the train” when they don’t. Impatience also plays into the equation. Drivers, bicyclists, and pedestrians may take more risks when they see a long freight train coming down the tracks, even at a slow speed, because they do not want to wait for the train to pass.⁴⁷

Obviously, it would be much safer to yield to the train or to find an alternate route.

34 Parked train cars also create a visual obstruction. When a train is parked on the siding (even if split or parked entirely to one side of the crossing), motorists, bicyclists, and pedestrians will find it comparatively more difficult to see trains approaching on the main line.⁴⁸ Such individuals may also mistakenly believe that a parked train has activated the crossing’s active warning devices.⁴⁹ BNSF witness Richard Wager explained, “With a parked train blocking visibility on the mainline, [motorists, bicyclists, and pedestrians] may assume that the parked train has created a false alarm (the speed limit on this track is currently 10 mph so it could take a while for a train moving on the mainline to come into

⁴⁵ Exh. No. GH-1T at 7.

⁴⁶ Exh. No. PC-1T at 28:18-29:3; *see also* Exh. No. RW-1T at 7:9-11 (“The loss of the use of the crossing to the public for extended periods of time has the tendency to create driver behavior to attempt to ‘beat the train’ when the driver notices the warning devices activate in advance of a train’s arrival.”); Exh. No. GH-1T at 7.

⁴⁷ Exh. No. SN-1T at 4:18-23.

⁴⁸ Exh. No. GH-1T at 7 (“A parked train will prevent an open view of trains moving on the mainline for northbound drivers, and in the event that a train is stopped on the mainline, it would prevent an open view of trains moving on the siding track for southbound drivers.”); Exh. No. SN-1T at 5:23-24 (“[O]ne train can sometimes obscure the view of another oncoming train until the other train has entered or is very close to the crossing.”); *see also* Exh. No. RW-1T at 6:22-24; Exh. No. PC-1T at 29:1-3.

⁴⁹ Exh. No. GH-1T at 7.

view), and attempt to disregard the warnings.”⁵⁰ Mr. Neubauer notes, “Even a train traveling 10 miles per hour or less cannot stop quickly or in a short distance, even after applying the emergency brakes.”⁵¹

35 Finally, pedestrians and bicyclists maneuvering around parked train cars may be surprised when the train suddenly begins to move.⁵² Richard Wagner testified, “It is . . . very dangerous for bicyclists or pedestrians to cross near parked trains that are subject to move at any time, where the conductor may be more than a mile away from the pedestrian(s) because of the length of the train and unable to see the person on the tracks.”⁵³

36 Staff’s position is that the Valley View crossing will be unusually hazardous.⁵⁴ Whatcom County makes no attempt to argue otherwise. No party contends the crossing should be saved by converting it to an over- or under-crossing.⁵⁵

2. The Record Fails to Establish Strong Public Need for the Crossing

37 The record contains almost no evidence of public need. It instead suggests that the closure’s adverse impacts will be relatively minor.

38 The closure will divert traffic across two alternative crossings: the Ham Road grade crossing and the Main Street grade crossing. The record shows these alternatives are reasonable. Staff witness Paul Curl drove the alternate routes and “found the distance and travel times to be reasonable.”⁵⁶ He testified, “While these [alternative] routes may create

⁵⁰ Exh. No. RW-1T at 6:27-7:3.

⁵¹ Exh. No. SN-1T at 5:6-7..

⁵² Exh. No. RW-1T at 7:3-5.

⁵³ Exh. No. RW-1T at 7:3-5.

⁵⁴ See Exh. No. PC-1T at 29:7-8 (“The crossing will be exceptionally dangerous with the addition of a second track.”); see also Exh. No. RW-1T at 9:15-18 (“The addition of a second set of tracks to the Valley View crossing . . . will create an exceptionally hazardous crossing upon completion of the siding extension.”)

⁵⁵ See Exh. No. RW-1T at 8:1-4 (“The County could decide to construct an overpass at its expense if it believed that the traffic levels justified the need, but we [BNSF] have not been advised that it is willing to do that.”); see also Exh. No. KB-3 at 5 (costs of grade separation outweigh benefits).

⁵⁶ Exh. No. PC-1T at 23:18-19.

some inconvenience for residents, they will be safer once improvements are made and the crossings meet the public need for crossing the tracks.”⁵⁷ BNSF’s traffic impact study notes, “Access to the surrounding crossings require less than 2.0 miles of adverse travel.”⁵⁸ Kurt Bialobreski, who authored the traffic impact study, agreed at the evidentiary hearing that the alternate crossings can “safely accommodate any rerouted traffic.”⁵⁹

39 The closure will minimally impact school bus traffic. Staff witness Paul Curl personally observed a “full size school bus from Lynden Christian School”⁶⁰ using the Valley View crossing when he performed a site visit shortly before the December 1 evidentiary hearing. This observation did not alter Mr. Curl’s recommendation that the crossing be closed (a recommendation based on the assumption that up to three school buses travel over the crossing daily).⁶¹

40 The closure will negligibly impact emergency response capabilities. The area near the crossing is served by two fire protection districts, Whatcom County Fire District 7 and North Whatcom Fire and Rescue.⁶² Polly Linville of Fire District 7 told BNSF that the closure will have no impact on emergency response times.⁶³ Henry Hollander of North Whatcom Fire and Rescue testified that the closure will cause “delays in response times for fire suppression and BLS [basic life support], ranging from 1-4 additional minutes.”⁶⁴ He acknowledged, however, that response times will continue to fall within the existing range.⁶⁵

⁵⁷ Exh. No. PC-1T at 23:19-21; *see also* Exh. No. SN-1T (“[G]iven that there is alternate access available, I believe the crossing should be closed because it presents an increased safety exposure to the traveling public once the second track is added.”).

⁵⁸ Exh. No. KB-3 at 5.

⁵⁹ Transcript Vol. II at 52:12-14 (Dec. 1, 2015) (Kurt Bialobreski).

⁶⁰ Transcript Vol. II at 59:23-24 (Dec. 1, 2015) (Richard Wagner).

⁶¹ *See* Transcript Vol. II at 60:12-17 (Dec. 1, 2015) (Paul Curl); Exh. No. PC-1T at 5:20-21.

⁶² Exh. No. KB-3 at 5.

⁶³ Exh. No. KB-3 at 5.

⁶⁴ Exh. No. HH-1T at 3.

⁶⁵ Exh. No. KB-4T at 8:6-10.

At the evidentiary hearing, Mr. Hollander clarified that he had no position on BNSF's petition. He said his role was "simply to provide information."⁶⁶

41 Whatcom County witness Joe Rutan noted that "the additional two to four minutes that it may take emergency response vehicles to arrive at locations south of the proposed closure on Valley View Road could be a matter of life and death for the person(s) in need of emergency assistance."⁶⁷ This statement is no doubt accurate, but its probative value is limited. As Mr. Hollander testified, when it comes to emergency response, faster is always better.⁶⁸ The record, however, reveals nothing unique about the provision of emergency services to locations near the crossing. As Mr. Hollander acknowledged, "the area affected by the proposed closure of Valley View is relatively lightly populated."⁶⁹

42 Many local residents submitted comments opposing BNSF's petition, raising a variety of concerns (e.g., compliance with SEPA, loss of freeway access, increased emergency response times, pollution, reasonableness of alternative routes). The *evidentiary record*, however, fails to establish adverse impacts to any particular individual. Under the Commission's procedural rules, public comments do not qualify as substantive evidence unless formally treated as such by the presiding officer.⁷⁰ Whatcom County did not request that any documents submitted by public witnesses be treated as substantive evidence.⁷¹

⁶⁶ Transcript Vol. II at 102:13 (Dec. 1, 2015) (Henry Hollander).

⁶⁷ Exh. No. JR-1T at 3.

⁶⁸ Exh. No. HH-1T at 3 ("[O]ur goal is always to reduce response times within the limits of safety, rather than increase them to the detriment of our mission.").

⁶⁹ Exh. No. HH-1T at 3.

⁷⁰ Under WAC 480-07-498, the Commission treats each public comment received as "an illustrative exhibit that expresses public sentiment received concerning the pending matter."

⁷¹ WAC 480-07-490 provides, "Documents a public witness presents that are exceptional in their detail or probative value may be separately received into evidence as proof of the matters asserted after an opportunity for cross-examination."

43 Not all public witnesses oppose the closure. Shiraz Balolia, who owns property next to the crossing, wrote, "After a review of [BNSF's] petition, including the SEPA Environmental Checklist, the Description of Closure, and the proposed mitigation alternatives, **I have no objection to this project.** It appears that the impact will be minimal to my property as we access Valley View Road from Portal Way."⁷²

3. On Balance, Public Need Fails to Justify Risk

44 On balance, public need fails to justify the risk presented by the Valley View crossing (as modified by the Intalco Yard expansion project).

D. Recommended Mitigations

45 If the Commission closes Valley View Road, it may order BNSF to mitigate the closure's adverse impacts. BNSF has already accepted its responsibility to mitigate impacts and has agreed to construct and pay for a number of infrastructure upgrades. According to BNSF, mitigation efforts "will be funded as part of BNSF's Intalco Yard expansion project."⁷³ BNSF confirms, "Whatcom County **will not** be responsible for funding or constructing the mitigation option(s) proposed by BNSF, except for revised traffic signs."⁷⁴

46 As discussed below, Staff either supports or defers judgment on the great majority of BNSF's proposals. The parties' only real disagreement concerns mitigation of the Ham Road crossing. Staff believes Ham Road should be widened near the crossing. BNSF and Whatcom County believe the crossing is sufficiently wide.

⁷² Exh. No. B-1, Comment of Shiraz Balolia (emphasis in original).

⁷³ Petition at 5.

⁷⁴ Petition at 5.

1. South Approach to Valley View Crossing (from Arnie Road)

47 BNSF proposes to mitigate adverse impacts on the crossing's south approach by working with Whatcom County to "install signage . . . to indicate no public thoroughfare."⁷⁵ Staff defers to Whatcom County regarding the necessity and feasibility of this mitigation.⁷⁶

48 BNSF originally proposed to help Whatcom County "construct a cul-de-sac north of Arnie Road prior to the bridge on Valley View Road [i.e., south of the crossing]."⁷⁷ Evidently, BNSF no longer supports this mitigation. BNSF now hopes Whatcom County will convert the crossing's south approach from a public road to a private road, thereby eliminating the need for a cul-de-sac.⁷⁸ Staff defers this issue to Whatcom County.

2. North Approach to Valley View Crossing (from Creasey Road)

49 BNSF proposes to mitigate impacts on the crossing's north approach by paying for appropriate signage at the intersection of Valley View Road and Creasey Road.⁷⁹ BNSF also proposes to redesign the intersection "to allow design vehicles to turn around."⁸⁰ Staff defers to Whatcom County regarding the necessity and feasibility of these mitigations.⁸¹

50 At the evidentiary hearing, Staff proposed that BNSF pay for a cul-de-sac just north of the Valley View crossing, with the view that vehicles approaching the crossing from Creasey Road should have a safe place to turn around.⁸² BNSF opposes this proposal on the theory that the cul-de-sac will rarely be used.⁸³ Staff defers this issue to Whatcom County

⁷⁵ Exh. No. RW-1T at 4:10-11; *see also* Transcript Vol. II at 26:8-15 (Dec. 1, 2015) (Richard Wagner).

⁷⁶ Exh. No. PC-1T at 25:10-12.

⁷⁷ Petition at 5.

⁷⁸ Transcript Vol. II at 27:8-12 (Dec. 1, 2015) (Richard Wagner) ("[A] cul-de-sac would only be constructed if you were going to have public vehicles and there was going to be public access to the road. We're proposing that there not be any public access to Valley View on the south approach to the crossing.")

⁷⁹ Petition at 5; *see also* Exh. No. RW-1T at 4:10-11; Transcript Vol. II at 27:22-25 (Dec. 1, 2015).

⁸⁰ Exh. No. KB-3 at 15; *see also* Exh. No. RW-1T at 4:11-12; Transcript Vol. II at 28:1-4 (Dec. 1, 2015).

⁸¹ Exh. No. PC-1T at 26:7-8.

⁸² Transcript Vol. II at 61:10-62:15 (Dec. 1, 2015) (Paul Curl).

⁸³ Transcript Vol. II at 28:14-21 (Dec. 1, 2015) (Richard Wagner).

but urges the county to consider a cul-de-sac in lieu of the planned redesign of the Creasey Road intersection. As Staff witness Paul Curl explained, a cul-de-sac will better serve property owners with access north of the crossing:

I truly believe that there ought to be a cul-de-sac constructed at the crossing. I think earlier testimony said there was just one residence there, but I counted at least five access roads off of Valley View Road between Creasey and the existing crossing. I think my recommendation would be to build a barricade right at the crossing as close as you can to the crossing which gives property owners access along Valley View Road to their property. I'm not sure how just reconstructing Creasey Road gives access to the property owners. I think it's about three-tenths of a mile between Creasey Road and the crossing, 1,500 feet. There's a lot of property there and I would support a cul-de-sac at the crossing. I understand that's a difficulty because of private ownership, but I think that's the best solution in this case.⁸⁴

A cul-de-sac is superior in one other respect: If a driver proceeds toward the crossing from Creasey Road (despite any signage indicating that the crossing is closed), that driver will need a safe place to turn around upon reaching the closed crossing. The proposed redesign of the Creasey Road intersection will do nothing for this driver.

3. Ham Road Grade Crossing

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If the Commission closes the Valley View crossing, vehicular traffic will increase at the Ham Road grade crossing. To mitigate the effects of increased traffic, BNSF has agreed to pay for the installation of gates, flashing lights, and increased signage.⁸⁵ It also agreed to pay for new stop lines and other pavement markings.⁸⁶ Staff supports these mitigations. Currently, Ham Road is protected only passively by stop signs.⁸⁷

⁸⁴ Transcript Vol. II at 61:18-62:9 (Dec. 1, 2015) (Paul Curl).

⁸⁵ Petition at 5; Exh. No. KB-3 at 15; Exh. No. KB-4T at 4:1-5; Exh. No. GH-1T at 5; Transcript Vol. II at 25:15-18 (Dec. 1, 2015).

⁸⁶ Exh. No. KB-4T at 4:17-20; Transcript Vol. II at 25:15-18 (Dec. 1, 2015) (Richard Wagner).

⁸⁷ Exh. No. PC-1T at 14:21-22.

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Because Ham Road is narrow, measuring only 18 feet across with deep ditches on either side,⁸⁸ Staff originally proposed that BNSF collaborate with Whatcom County to widen the road and install stop refuges.⁸⁹ Staff continues to support road widening but now defers to Whatcom County regarding stop refuges.

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Staff witness Paul Curl explained that widening is necessary from a safety perspective:

I think that that road [Ham Road], even though I'm not a traffic engineer, I believe it's a safety issue, not a traffic issue. And maybe I can give you an example. Yesterday I was onsite at the Ham Road crossing. There was a pickup truck approaching from one direction, a motor vehicle of a passenger car [sic] approaching from the other direction. The pickup stopped and allowed the car to go across the crossing just like it was a one-way bridge. And I've driven across that crossing several times and it's not comfortable, it feels too tight. And I don't think this has anything to do with traffic engineering, I think it has to do with safety engineering. . . . [I]f you were to meet a bus for instance, at that crossing, I think there's a hazard of—potential hazard of a vehicle driving off the side of the crossing, perhaps fouling the traffic in some way, a broken axle.⁹⁰

The installation of flashing lights and gates at the crossing will not alleviate Mr. Curl's concerns.⁹¹ From a safety perspective, the road is simply too narrow.

54

Staff continues to advocate for road widening, preferably beginning 50 feet on each side of the crossing, and gradually expanding to a width of 22 feet at the crossing (the road is currently 18 feet wide).⁹² This mitigation would allow motorists to “comfortably pass and meet each other at the crossing.”⁹³

⁸⁸ Exh. No. PC-1T at 15:3-4, 17:18.

⁸⁹ Exh. No. PC-1T at 17:19-18:2. A “stop refuge” is a short lane located to the right of the traveling lane on the approach to a crossing. The extra lane allows vehicles that are required by law to stop at the crossing (e.g., school buses) to pull safely to the side, leaving the traveling lane open for vehicles that are not required to stop. *Id.* at 18:5-9.

⁹⁰ Transcript Vol. II at 69:1-19 (Dec. 1, 2015) (Paul Curl).

⁹¹ Transcript Vol. II at 70:19-25 (Dec. 1, 2015) (Paul Curl).

⁹² *See* Transcript Vol. II at 69:20-70:4 (Dec. 1, 2015) (Paul Curl).

⁹³ Transcript Vol. II at 70:3 (Dec. 1, 2015) (Paul Curl).

4. Main Street Grade Crossing

55 If the Commission closes the Valley View crossing, vehicular traffic will also
increase at the Main Street grade crossing. It is undisputed that existing active warning
devices at this crossing (i.e., flashing lights and gates) should remain in place.⁹⁴

56 Staff originally proposed that BNSF collaborate with Whatcom County to widen the
road and install stop refuges.⁹⁵ Staff now defers to the county regarding both road widening
and stop refuges.

5. Main Street/Portal Way Intersection

57 The Main Street grade crossing is located near the intersection of Main Street and
Portal Way. To mitigate adverse traffic impacts at this intersection, BNSF proposes to pay
for construction of a southbound right turn lane.⁹⁶ Staff supports this mitigation but believes
Whatcom County should first determine whether interconnected traffic signals are
warranted.⁹⁷ If traffic signals are not warranted, the proposed turn lane is a good alternative.

III. CONCLUSION

58 Because the evidentiary record shows that public need for the Valley View crossing
fails to justify the crossing's risks, the Commission should close the crossing. If the
Commission determines that the closure should be conditioned on a commitment from

⁹⁴ Transcript Vol. II at 28:22-29:1 (Dec. 1, 2015); Petition at 5; Exh. No. RW-1T at 4:8-9; Exh. No. PC-1T at 21:18-19.

⁹⁵ Exh. No. PC-1T at 21:12-14.

⁹⁶ Exh. No. KB-3 at 15; Exh. No. PC-1T at 22; Exh. No. JR-1T at 3.

⁹⁷ Exh. No. PC-1T at 22:8-10.

BNSF to pay for certain infrastructure upgrades or safety improvements, the Commission should enumerate these conditions in its order.

DATED January 8, 2016.

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