**BEFORE THE WASHINGTON STATE**

**UTILITIES AND TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY,

Petitioner

vs.

WHATCOM COUNTY,

 Respondent.

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DOCKET NO: TR-150189

**PETITIONER BNSF RAILWAY COMPANY’S POST-HEARING BRIEF**

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**INTRODUCTION**

*1* BNSF Railway Company has petitioned to close the Valley View Road public at-grade railroad crossing in light of the exceptional hazards that would be presented to motorists and pedestrians by the future addition of a siding track across the road. Siding tracks hold trains temporarily pending further movement, and also provide a location for trains to meet and pass. If an at-grade railroad crossing remains open to public travel after the addition of a siding track, the extended blockage times can confuse motorists, impede motorists’ ability to see trains approaching on adjacent tracks, and invite dangerous and illegal public behavior. Trains cannot steer and they cannot stop quickly, and a train-vehicle or train-pedestrian crash can result in severe or fatal injuries. Because of those inherent hazards, the Commission has an established precedent to order the closure of public crossings located across siding tracks, where nearby crossings can safely and reasonably accommodate rerouted traffic. Such is the case with the Valley View crossing.

*2* When deciding whether to grant a petition to close an existing at-grade public crossing, there are several issues that the Commission has held are outside of its scope of review. First, Commission review does not concern whether the railroad could or should construct its siding track in a different location, or alter its train operations to avoid blocking the existing crossing (as virtually every court addressing the issue, including the Washington Supreme Court, has recognized, state and local attempts to regulate railroad operations are preempted by federal law[[1]](#footnote-1)). Second, the Commission does not have authority to perform appellate review of a different agency’s SEPA Determination of Nonsignificance for the underlying siding expansion project.[[2]](#footnote-2) Simply put, for its analysis, the Commission considers the circumstances at the crossing as they would exist upon construction of the siding.

*3* In this case, BNSF has proposed various crossing-closure-related traffic mitigation plans. Those recommendations are supported by Whatcom County’s traffic engineer, should the crossing be closed. Commission Staff supports BNSF’s petition for closure.

**RELIEF REQUESTED**

*4* BNSF respectfully requests that the Washington Utilities and Transportation Commission grant its petition to close the Valley View public railroad crossing, upon completion of the civil mitigation improvements described below that would precede construction of BNSF’s Intalco Yard siding track project.

**STATEMENT OF FACTS**

 **1. Rail transportation is important to Washington’s communities.**

*5* BNSF Railway Company operates an average of 1,600 trains per day over 32,500 route miles across 28 states and three Canadian provinces, including Washington State.[[3]](#footnote-3) BNSF transports the products and materials that help feed, clothe, power, and supply communities throughout the country.[[4]](#footnote-4) Rail transport moves these goods more safely and efficiently, using less fuel, with fewer emissions than trucks on the highway.[[5]](#footnote-5) BNSF’s network includes just over 25,800 grade crossings, and promoting grade-crossing safety is an essential part of BNSF’s operation and culture.[[6]](#footnote-6)

 **2. Siding tracks are essential to the rail system.**

*6* As communities grow, the demand for freight and passenger rail services continues to increase.[[7]](#footnote-7) In order to respond to these market demands, BNSF continually monitors and invests in the capacity of its rail system.[[8]](#footnote-8) Train tracks are not like a highway; most of the time there is only one set of mainline tracks.[[9]](#footnote-9) BNSF has installed periodic siding tracks to allow trains traveling in opposite directions to meet and pass each other or to allow higher priority trains like Amtrak and UPS trains to pass.[[10]](#footnote-10) This is necessary on tracks where trains have different priority and speeds, and helps prevent a backlog of trains needing to get through the same stretch of track.[[11]](#footnote-11)

*7* The need for additional, or longer (as the average length of trains increase), meet/pass siding tracks continues to present opportunities for capacity improvements.[[12]](#footnote-12) If a long freight train cannot fit into a particular siding track, that train must continue to the next long-enough siding before it can pull off the mainline. This can cause delays for faster passenger trains and higher-priority freight trains needing to pass other trains on the Bellingham subdivision.[[13]](#footnote-13)

*8* In 2014, the Pacific Northwest experienced backlogs of trains.[[14]](#footnote-14) Trains destined for the Cherry Point subdivision were delayed due to the absence of suitable siding tracks.[[15]](#footnote-15) This resulted in backups on the Bellingham subdivision as trains waited to meet trains exiting Cherry Point.[[16]](#footnote-16) It also caused longer gaps between available meet/pass locations for other trains running through Whatcom County.[[17]](#footnote-17)

*9* As Grant Haag, BNSF Terminal Superintendent of the Greater Seattle Terminal Complex, explained:

In Washington State, specifically, economic and community growth are expected to increase. Washington is a trade dependent state with major industries, including aircraft manufacturing, forest products, and agriculture. Rail plays an important role in exporting those products to other states and countries, and in attracting new industries to our state as well. The demand for passenger rail service has also increased. In order to meet the increasing need, and minimize shipping delays, BNSF must continue to upgrade its infrastructure which includes building and expanding siding tracks, to prevent unscheduled service outages that can slow down the rail network, reduce capacity, and delay freight reaching our customers. A train delay in Washington State can have a “domino effect” along the system and delay trains in other states as well. Everything is interconnected and impacts the fluidity of the rail system.[[18]](#footnote-18)

 **3. The Valley View Road at-grade crossing is on a low-volume road.**

*10* The Valley View Road at-grade crossing is a rural railroad crossing west of Custer in Whatcom County, Washington, on BNSF’s Cherry Point Subdivision.[[19]](#footnote-19) On average, 364 motorists drive across the tracks per day, making Valley View a “low-volume road” per the Manual on Uniform Traffic Control Devices.[[20]](#footnote-20) There are adjacent crossings on either side of Valley View (Ham/Arnie Road, and Main Street) within two miles of additional travel.[[21]](#footnote-21) On average, eight trains per day currently travel through the crossing.[[22]](#footnote-22) The train speed limit is 10 miles per hour.[[23]](#footnote-23)

**4. The Intalco Yard siding track extension will improve rail transportation and cross Valley View Road upon completion.**

*11* One of BNSF’s siding tracks is called the “Intalco Yard” siding track, and it exists to the west of Valley View Road.[[24]](#footnote-24) The Intalco Yard siding track is not long enough to place full-length trains. Presently, trains need to go through multiple switching operations to separate the cars and hold portions of a train on shorter yard tracks and the siding track, which increases congestion and road blockages.[[25]](#footnote-25) In order to minimize the bottlenecking in the Cherry Point and Bellingham subdivisions described above, and to help improve rail traffic along the entire line, BNSF plans to lengthen the Intalco siding.[[26]](#footnote-26)

*12* Upon completion, the Intalco project 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, and also minimize the train delays on the Bellingham Subdivision as described above. The project will extend both ends of the current track to create an overall length that is planned to be 7,230 feet.[[27]](#footnote-27) Once the project is complete, the siding track will cross Valley View Road. The existing siding and mainline track structures will also be upgraded to improve efficiency and security.[[28]](#footnote-28)

**5. Adding a siding track to the Valley View Road crossing will increase the hazards to a point that outweighs the need for continued public access.**

*13* After the Intalco project is finished, a train or railcars placed onto the siding track could be parked on the siding for hours or more, depending on the customer’s needs and other train traffic in the area.[[29]](#footnote-29) Valley View road could therefore be blocked for hours.[[30]](#footnote-30)

*14* Even if a train was short enough to be parked on either side of the crossing without physically blocking the road, a visibility hazard may be created for cars and pedestrians at the crossing.[[31]](#footnote-31) A train on the siding would prevent northbound drivers from having an open view of trains moving on the mainline, and in the event that a train was stopped on the mainline, it would prevent southbound drivers from having an open view of trains moving on the siding track.[[32]](#footnote-32) Trains do not move on particular schedules, so trains can always be expected at any time.[[33]](#footnote-33)

*15* Driver perception presents a serious safety concern because motorists can misjudge a train’s speed.[[34]](#footnote-34) Some people may believe that train brakes work similar to a vehicle’s brakes and that a train can stop in a much shorter distance than is actually possible.[[35]](#footnote-35) Even trains moving relatively slowly cannot stop quickly.[[36]](#footnote-36) Drivers and pedestrians therefore may think that they have enough time to cross, when in reality they should wait as they may not have time to safely clear the tracks.[[37]](#footnote-37) These risks only increase when there are multiple sets of tracks; one train can sometimes obscure the view of another oncoming train until the other train has entered or is very close to the crossing.[[38]](#footnote-38) Closing this crossing would address these potential safety issues.[[39]](#footnote-39)

**6. Active warning devices are not sufficient to address the dangers.**

*16* Lights and gates would not present an acceptable alternative to closure in this particular instance.[[40]](#footnote-40) As witnesses explained in prefiled testimony, even with lights and gates, drivers may disregard warning devices when they believe the cause for the activation of gates is the nearby train that is not moving.[[41]](#footnote-41) This creates the potential for a driver to violate the warning devices and drive into the path of an oncoming train.[[42]](#footnote-42) Further, if trains were parked across the road, pedestrians could be tempted to walk under, over, near or around the trains, which could present serious or potentially fatal consequences.[[43]](#footnote-43) In addition, sometimes motorists drive into the side of parked trains.[[44]](#footnote-44)

*17* There are a variety of reasons that motorists and pedestrians disregard warning devices, even lights and gates, at a crossing. Driver inattention is a common factor.[[45]](#footnote-45) The train speed limit through the Valley View crossing is 10 miles per hour; drivers, pedestrians, and bicyclists may also underestimate the potential dangers of a slow-moving train, thinking that they have time to try to “beat” the train when they do not.[[46]](#footnote-46) 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, especially at a slow speed, because they do not want to wait for the train to pass.[[47]](#footnote-47) Mr. Neubauer was a locomotive Engineer for over twenty years, and throughout his career it was almost a daily occurrence for drivers to race to get across the tracks before the train arrived.[[48]](#footnote-48)

 **7. A crash at the crossing could be devastating.**

*18* As Operation Lifesaver presenter and rail safety witness Mr. Neubauer explained, the weight ratio of a train to a car is about that of a car to a soda can, about 4,000 to 1.[[49]](#footnote-49) Imagining the impact between a car and a soda can shows what sort of effect a train/vehicle collision could have. In vehicle/train collisions, people are about 20 percent more likely to die than in vehicle/vehicle collisions, simply because of the weight difference.[[50]](#footnote-50)

**8. The Traffic Impact Study concludes that adjacent crossings can safely and reasonably accommodate rerouted traffic.**

*19* BNSF petitioned to close the crossing because of the safety hazards implicated by a siding track through a crossing.[[51]](#footnote-51) BNSF provided the most recent FRA crossing inventory traffic count that was available when it filed the petition for closure.[[52]](#footnote-52) After the petition was submitted, the County notified BNSF that it had performed a traffic count per WUTC Staff’s request at the parties’ Crossing Safety Assessment Meeting, which measured an Average Daily Traffic Count of 365 vehicles. BNSF subsequently asked a traffic expert to perform a Traffic Impact Study and independently confirm all traffic counts.[[53]](#footnote-53)

*20* BNSF filed the resulting Traffic Impact Study.[[54]](#footnote-54) The Study considered safety and diagnostic evaluations at the adjacent crossings, and determined that the alternate crossings could safely accommodate any rerouted traffic, a conclusion that the County traffic engineer corroborated.[[55]](#footnote-55) BNSF’s traffic engineer testified that exposure factors in the surrounding area would be reduced upon closure of the Valley View crossing.[[56]](#footnote-56)

*21* The Traffic Impact Study also noted that closure of the Valley View Road crossing would not prevent emergency responders from meeting their response time goals in the local area, a fact that was confirmed by Fire Chief Hollander at the evidentiary hearing.[[57]](#footnote-57) Chief Hollander testified that the fire district would consider a policy change to avoid the Valley View crossing even if it remained open, given that it would be subject to long blockages.[[58]](#footnote-58) In fact, for a number of stations potentially dispatched to an emergency response call, there would be no projected impact on emergency response time.[[59]](#footnote-59)

 **9. Proposed mitigation options address the impact of closure.**

*22* BNSF also proposed, and offered to fund at no expense to the public, a number of specific mitigation recommendations relating to the crossing closure. During the evidentiary hearing, the County’s traffic engineer and BNSF jointly supported the following mitigation proposals:

* Install flashing lights and gates, pavement markings, and increase signage at the Ham-Arnie crossing.[[60]](#footnote-60)
* Install signage at Valley View-Arnie Road intersection, specifically one sign at the south approach, one at the east approach, and one at the west approach.[[61]](#footnote-61)
* Redesign the Creasey/Valley View Road intersection to allow design vehicles to turn around (BNSF would submit a specific design to the County, which would review and approve it).[[62]](#footnote-62)
* Install signage at the north approach to the crossing, at the Valley View/Creasey intersection.[[63]](#footnote-63)
* Keep existing active warning devices and signals at the Main Street crossing.[[64]](#footnote-64)
* Construct a southbound right turn lane at Portal Way and Main Street. [[65]](#footnote-65)

*23* Traffic engineers for BNSF and the County jointly agreed that the following proposals would ***not*** be necessary or required under the circumstances:

* Stop refuges at Ham-Arnie.[[66]](#footnote-66)
* Widening the crossing at Ham-Arnie.[[67]](#footnote-67)
* Installing a turnaround north of the Valley View crossing, south of the Creasey Road intersection.[[68]](#footnote-68)
* Signalizing the entire intersection at Main Street and Portal Way.[[69]](#footnote-69)
* Constructing stop refuges at the Main Street crossing.[[70]](#footnote-70)
* Widening the Main Street crossing.[[71]](#footnote-71)

*24* The only mitigation issue that presented a disagreement between BNSF and the County regarded whether to construct a turnaround north of Arnie Road prior to the bridge on Valley View Road. The County engineer recommended a hammerhead turnaround.[[72]](#footnote-72) BNSF recommended that the public not be allowed access to Valley View on the south approach to the crossing, rendering a turnaround unnecessary.[[73]](#footnote-73)

**STATEMENT OF ISSUES**

*25* In Washington, closure of a public railroad crossing is proper when the crossing’s hazards outweigh the need for it to remain open to public travel. The Valley View Road crossing will become exceptionally hazardous once BNSF completes its siding track extension project; Valley View Road is a low-traffic-volume road, and suitable alternate crossings exist nearby. In light of these factors, the Commission should grant BNSF’s closure request.

**EVIDENCE RELIED UPON**

*26* This brief relies upon testimony at the evidentiary hearing, prefiled testimony, and exhibits in the record, as specifically cited herein.

**ARGUMENT**

**1. The legal test—public safety versus convenience and necessity.**

*27* RCW 81.53.060 allows railroad companies to petition the Washington Utilities and Transportation Commission when the railroad believes “that the public safety requires” the “closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing.”[[74]](#footnote-74) The Commission then determines “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.”[[75]](#footnote-75) The Commission considers the levels of motor vehicle and train traffic; the number of people closure would affect; whether alternative, safer crossings are nearby; and whether those crossings can absorb the additional traffic.[[76]](#footnote-76)

**2. Public convenience and necessity do not require that the Valley View Road crossing remain open in light of its hazardous condition upon completion of the siding extension project.**

**A. All railroad crossings are inherently dangerous, and the Commission has held that public railroad crossings through siding tracks are exceptionally hazardous.**

*28* Compared to all states, Washington had the 27th-highest number of grade crossing collisions in 2014.[[77]](#footnote-77) Washington law states that railway-highway crossings must be overpasses or underpasses whenever practicable.[[78]](#footnote-78) The law also recognizes the need for clear visibility near grade crossings.[[79]](#footnote-79) The Commission has established a precedent for closing crossings that would bisect siding tracks, because the addition of siding tracks “magnifies the danger presented to vehicular traffic, creating an exceptionally hazardous crossing . . . .”[[80]](#footnote-80)

*29* The Commission has emphasized the dangers at railroad crossings in the middle of siding tracks:

[A]t-grade crossings with more than one set of tracks are significantly more dangerous than at-grade crossings with only a single set of tracks. When a siding track creates the potential to obstruct a motorist’s view of the main line track, the crossing becomes exceptionally hazardous.[[81]](#footnote-81)

As the testimony and exhibits established, the safety hazards at a crossing in the middle of a siding track include, but are not necessarily limited to:

* frequent crossing blockages for variable and sometimes extended lengths of time, at unpredictable intervals;
* trains stopped on the siding but not blocking the crossing, which can dangerously impede sight for motorists using the crossing;
* incentives for risky driver behavior, such as trying to beat a train before it parks and blocks the crossing—or, after one train passes, bypassing warning devices and being struck by an unexpected second train; and
* temptations for pedestrians to climb over or under trains that are subject to slack action or movement without warning.

**B. The Valley View Road crossing will be exceptionally hazardous as a matter of law once BNSF completes the siding extension.**

*30* In this case, Valley View Road will experience each of the above-mentioned hazards after BNSF extends the Intalco siding. As a matter of law, the Valley View Road crossing will become exceptionally hazardous. Neither the County nor Commission Staff contested these facts or conclusions at the hearing.

**C. Using safer crossings nearby will mitigate the closure’s impact on public convenience and necessity.**

*31* “Consolidation of crossings necessarily inconveniences those whose crossing is eliminated in favor of adjacent crossings.”[[82]](#footnote-82) The safety risks eclipse the scope of the public’s need for the low-traffic-volume Valley View Road crossing. In this case, both BNSF’s and the County’s traffic engineers concluded that using either of the adjacent crossings will mitigate the closure’s inconvenience to the public.

*32* No party rebutted the following facts:

* Even if the Valley View Road crossing were to remain open, its unscheduled blockages would discourage emergency responders from using the crossing.
* Closure will not significantly impact other roadways.
* Emergency response times will still fall within the acceptable range for the fire district’s response time goals.
* Mitigating measures, such as upgrading the warning devices at the Ham/Arnie crossing and creating a turn lane at the Portal Way/Main Street crossing, can ameliorate concerns about closure of the Valley View Road crossing.
* Continued use of the Valley View Road crossing is not necessary to enable emergency responders to protect the health, safety, and welfare of citizens residing in the vicinity of the crossing within established response time goals.
* Grade separation at the existing Valley View Road crossing for the purposes of extending an additional siding track through the crossing is not reasonable or practicable in view of the characteristics of the crossing.

*33* The overwhelming weight of testimony is that the public convenience and necessity do not require that the Valley View Road crossing remain open.

**CONCLUSION**

*34* The facts set forth above clearly demonstrate that the hazards of keeping the Valley View crossing open outweigh the need for this crossing to remain open to public travel. Therefore, the Commission should grant BNSF’s petition and order that the Valley View Road crossing in Whatcom County be closed.

DATED this 8th day of January, 2016.

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**CERTIFICATE OF SERVICE**

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp PLLC, whose address is 1218 Third Avenue, Suite 2500, Seattle, Washington, 98101.

I hereby certify that the original and 1 copy of BNSF RAILWAY COMPANY’S POST-HEARING BRIEF have been sent by VIA FED EX to Steven King at WUTC and a PDF version sent by electronic mail. I also certify that true and complete copieshave been sent to the following interested parties via U.S. Mail:

|  |  |
| --- | --- |
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|  |  |
|  |  |

I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 8th day of January, 2016, at Seattle, Washington.

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Pamela Ruggles, Paralegal

1. In 2012, the California Court of Appeals stated: “we have not discovered through our independent research, a single case in which a court considered ICCTA [(Interstate Commerce Commission Termination Act)] preemption and concluded that an antiblocking regulation was not preempted.” *People v. Burlington N. Santa Fe R.R*., 209 Cal. App. 4th 1513, 1529 (2012). [↑](#footnote-ref-1)
2. The Commission has previously recognized that there is no apparent “jurisdictional basis for the presiding officer or the Commissioners themselves to act in an appellate authority of another agency’s SEPA determinations.” *BNSF Ry. Co. v. City of Mount Vernon*, TR-070696, Order 03 Denying BNSF Motion to Limit Issues and Denying City of Mount Vernon’s Motions for Summary Judgment and In Limine ¶ 19 (Oct. 2, 2007). The Commission Staff’s counsel agreed: “Staff counsel is unaware of any legal authority that would allow Judge Pearson to issue a new or modified SEPA determination within the confines of the present adjudication. As a general rule, an agency acting on a proposal covered by an existing DNS must use that document ‘unchanged.’ WAC 197-11-600(3).” Commission Staff’s Response to Bench Request No. 4 (Dec. 4, 2015). [↑](#footnote-ref-2)
3. Haag, Exh. No. GH-1T, 2:6–11. [↑](#footnote-ref-3)
4. *Id*. at 2:6–11. [↑](#footnote-ref-4)
5. *Id*. [↑](#footnote-ref-5)
6. http://www.bnsf.com/communities/safety-and-security/railroad-grade-crossings/. [↑](#footnote-ref-6)
7. Haag, Exh. No. GH-1T, 2:19–20. [↑](#footnote-ref-7)
8. *Id*. at 2:20. [↑](#footnote-ref-8)
9. *Id*. at 2:20–21. [↑](#footnote-ref-9)
10. *Id*. at 2:21–23. [↑](#footnote-ref-10)
11. Wagner, Exh. No. RW-1T, 4:15–22. [↑](#footnote-ref-11)
12. Haag, Exh. No. GH-1T, 2:23–24. [↑](#footnote-ref-12)
13. *Id*. at 6:8–17. [↑](#footnote-ref-13)
14. BNSF’s Answers to Bench Requests Nos. 1–3 to BNSF, p. 2. [↑](#footnote-ref-14)
15. BNSF’s Answers to Bench Requests Nos. 1-3 to BNSF, p. 2. [↑](#footnote-ref-15)
16. *Id*. at p. 3. [↑](#footnote-ref-16)
17. *Id*. [↑](#footnote-ref-17)
18. Haag, Exh. No. GH-1T, 3:1–10. [↑](#footnote-ref-18)
19. Exh. No. RW-3CX. [↑](#footnote-ref-19)
20. Exh. No. KB-3, p. 3; Wagner, Exh. No. RW-1T, 8:26–9:3. [↑](#footnote-ref-20)
21. Biolobreski, Exh. No. KB-4, p.7. [↑](#footnote-ref-21)
22. Haag, Exh. No. GH-1T, 5:26–6:2. As acknowledged at the evidentiary and public hearings, some of BNSF’s trains carry crude oil to customers in the Cherry Point subdivision. BNSF is required, by federal law, to transport all kinds of commodities and cannot refuse to transport such products, including crude oil. Haag, Exh. No. GH-1T, 2:13–15. BNSF has implemented specific safety measures for crude oil shipments, including increased track inspections, increased trackside safety technology, risk-based traffic routing technology, lower train speeds, operating practice restrictions, additional requirements for unattended trains, and emergency response training and community outreach. *See* http://www.bnsf.com/communities/pdf/crude-oil-safety-measures.pdf. [↑](#footnote-ref-22)
23. Wagner, Exh. No. RW-1T, 7:1–2. [↑](#footnote-ref-23)
24. Exh. No. KB-3, p. 5. [↑](#footnote-ref-24)
25. Haag, Exh. No. GH-1T, 4:11–16. [↑](#footnote-ref-25)
26. While the Commission “has no jurisdiction to affect construction of [a] siding,” *see* Order Granting Petition, *Burlington N. Santa Fe Ry. v. Snohomish Co.,* TR-010194 ¶ 11 (2002); Commission Decision and Order Denying Review; Affirming Initial Order Granting Petition to Close a Rail Crossing, *Burlington N. R.R. Co. v. City of Ferndale*, TR-940330 p. 3 (1995), questions about the need for the Intalco Yard siding track extension were raised at the public hearing, and BNSF provided some additional explanation about the need to expand the siding track for context. [↑](#footnote-ref-26)
27. Haag, Exh. No. GH-1T, 5:9–14. [↑](#footnote-ref-27)
28. *Id*. at 4:19–21. [↑](#footnote-ref-28)
29. *Id*. at 6:19–22. [↑](#footnote-ref-29)
30. During the evidentiary hearing, Whatcom County’s traffic engineer questioned whether BNSF’s trains would be allowed to block a crossing for more than 15 minutes. The Washington Supreme Court has held that municipal codes or local laws that attempt to regulate train traffic, including anti-blocking laws, are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”). *City of Seattle v. Burlington N. RR. Co.*, 145 Wn.2d 661, 41 P.3d 1169 (2002) (“The express language of the ICCTA imparts to the STB broad federal authority over all interstate and intrastate railroad activities and operations . . . . The City's ordinance that reserves to it the authority to control railroad activities that interfere with city traffic is subject to preemption under the ICCTA.”). [↑](#footnote-ref-30)
31. Haag, Exh. No. GH-1T, 7:1–8. [↑](#footnote-ref-31)
32. *Id*. [↑](#footnote-ref-32)
33. *Id*. [↑](#footnote-ref-33)
34. Neubauer, Exh. No. SN-1T, 5:19–20. [↑](#footnote-ref-34)
35. *Id*. at 6:1–6. [↑](#footnote-ref-35)
36. *Id*. at 6:6. [↑](#footnote-ref-36)
37. *Id*. at 5:20–22. [↑](#footnote-ref-37)
38. *Id*. at 5:22–24. [↑](#footnote-ref-38)
39. Haag, Exh. No. GH-1T, 7:10–20; Neubauer, Exh. No. SN-1T, 4:17–23, 5:19–25, 6:21–7:3; Wagner, Exh. No. RW-1, 6:17–7:11. [↑](#footnote-ref-39)
40. BNSF explained why closure was proper, as compared to other alternatives. Mr. Wagner explained: “Once a grade crossing is closed/eliminated, the safety hazards I previously discussed are eliminated. It is nearly impossible that the crossing will ever be the site of a vehicle/bicycle train crash, with its accompanying possibility of death, personal injuries, property damage, fires, explosions, and/or hazardous material spills.).” Wagner, Exh. No. RW-1, 7:18–22. [↑](#footnote-ref-40)
41. Neubauer, Exh. No. SN-1T, 6:26–27; Wagner, Exh. No. RW-1, 6:17–7:11; Haag, Exh. No. GH-1, 7:10–20. [↑](#footnote-ref-41)
42. Haag, Exh. No. GH-1, 7:10–20. [↑](#footnote-ref-42)
43. Haag, Exh. No. GH-1, 7:10–20. [↑](#footnote-ref-43)
44. *Id*. [↑](#footnote-ref-44)
45. Neubauer, Exh. No. SN-1T, 4:17–18. [↑](#footnote-ref-45)
46. *Id*. at 4:18–20. [↑](#footnote-ref-46)
47. *Id*. at 4:21–23. [↑](#footnote-ref-47)
48. *Id*. at 4:10–11. [↑](#footnote-ref-48)
49. *Id*. at 3:24–25. [↑](#footnote-ref-49)
50. *Id*. at 3:27–4:1. [↑](#footnote-ref-50)
51. During the public hearing, a number of participants questioned whether BNSF’s petition was or should be part of the Gateway Pacific Terminal Project (“GPT”). The Department of Ecology and Army Corp. of Engineers have confirmed that the Intalco Yard project is separate and distinct from the GPT project; BNSF is not attempting to unlawfully “piecemeal” projects, as some of the public commenters suggested. Exh. Nos. PB-3; PB-6. Witness Pierre Bordenave explained the distinction by using the following example:

[L]et’s say there was a highway being proposed by the State through the County or in the City of Bellingham. That takes a number of years to evaluate, identify alternatives analyses, get the permits, and get the design correct. In the meantime, the City or the County has identified a local traffic problem or local traffic issue that needs to be addressed and decides that it needs to improve an arterial within that footprint of the highway. Those are two separate projects serving separate needs and requirements and so they would be done at different times and rates.

Bordenave, TR. 54:19–55:7. Mr. Bordenave confirmed that the purpose of the Intalco siding extension project, at issue in this petition, is:

to serve the Cherry Point Subdivision, because right now there is a siding that requires, as in my testimony, requires multiple switches and changes at that Intalco Yard to break trains up instead of having a full-length train. Full-length trains would need to stay on the mainline, thus completely clear the entire mainline before another train can come out.

Bordenave, TR. 55:11–22. [↑](#footnote-ref-51)
52. Wagner, Exh. No. RW-1T, 8:16. [↑](#footnote-ref-52)
53. *Id*. at 8:17–20. [↑](#footnote-ref-53)
54. Biolobreski, Exh. No. KB-2T; Exh. No. KB-3. [↑](#footnote-ref-54)
55. Rutan, TR. 95:6–10. [↑](#footnote-ref-55)
56. Biolobreski, TR. 40:18–23. [↑](#footnote-ref-56)
57. Hollander, TR. 110:19-22; 117:13–20. Chief Hollander stated that he did not intend to speak in opposition to or in support of the closure, but simply to provide information. TR. 102:9–13. [↑](#footnote-ref-57)
58. Hollander, TR. 104:10–25. [↑](#footnote-ref-58)
59. *Id*. at 113:8–21; 114:9–21. [↑](#footnote-ref-59)
60. Wagner, TR. 25:15–18; Rutan, TR. 77:25–78:4. [↑](#footnote-ref-60)
61. Wagner, TR. 26:10–15; Rutan, TR. 79:17–21. [↑](#footnote-ref-61)
62. Wagner, TR. 28:1–4; Rutan, TR. 83:24–84:3, 87:20–88:10. [↑](#footnote-ref-62)
63. Wagner, TR. 27:18–25; Rutan, TR. 86:1–5. [↑](#footnote-ref-63)
64. Wagner, TR. 28:22–29:1; Rutan, TR. 86:6–11. [↑](#footnote-ref-64)
65. Wagner, TR. 29:2–5; Rutan, TR. 86:12–16. [↑](#footnote-ref-65)
66. Wagner, TR. 25:19–22; Rutan, TR. 78:21:79:1. [↑](#footnote-ref-66)
67. Wagner, TR. 25:25–26:4; Rutan, TR. 79:2–8. [↑](#footnote-ref-67)
68. Wagner, TR. 28:7–14; Rutan, TR. 84:16–24. [↑](#footnote-ref-68)
69. Wagner, TR. 29:12–13; Rutan, TR. 86:17–21. UTC Staff witness Mr. Curl, who is not a traffic engineer, deferred to the traffic engineers. Curl, TR. 68:11–21. [↑](#footnote-ref-69)
70. Wagner, TR. 29:6–7; Rutan, TR. 86:22–87:1. UTC Staff witness Mr. Curl, who is not a traffic engineer, deferred to the traffic engineers. Curl, TR. 66:14–24. [↑](#footnote-ref-70)
71. Wagner, TR. 29:9–11; Rutan, TR. 87:5–19. UTC Staff witness Mr. Curl, who is not a traffic engineer, deferred to the traffic engineers. Curl, TR. 68:6–10. [↑](#footnote-ref-71)
72. Rutan, TR. 79:22–80:6. [↑](#footnote-ref-72)
73. Wagner, TR. 26:16–27:12. [↑](#footnote-ref-73)
74. RCW 81.53.060. [↑](#footnote-ref-74)
75. *Dep’t of Transp. v. Snohomish Co.*, 35 Wn.2d 247, 212 P.2d 829 (1949); *BNSF Ry. Co. v. City of Mount Vernon*, TR-070696 (2008). [↑](#footnote-ref-75)
76. *Ferndale*, TR-940330; *BNSF v. Skagit Co.*, TR-940282 (1996); *Union Pac. R.R. v. Spokane Co.*, TR-950177 (1996). [↑](#footnote-ref-76)
77. Neubauer, Exh. No. SN-1T, 4:4–5. [↑](#footnote-ref-77)
78. RCW 81.53.020; *Reines v. Chicago, Milwaukee, St. Paul & Pac. R. Co*., 195 Wn. 146, 80 P.2d 406 (1938); *State ex rel. Oregon-Washington R.R.& Nav. Co. v. Walla Walla Co.*, 5 Wn.2d 95, 104 P.2d 764 (1940). When addressing whether an over- or under-pass is practicable, the commission is directed to consider “the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry.” RCW 81.53.020. [↑](#footnote-ref-78)
79. *See* RCW 81.53.080 (prohibiting visual obstructions within one hundred feet of a grade crossing). [↑](#footnote-ref-79)
80. *BNSF Ry. Co. v. Snohomish Co*., TR-090121 (2009) p. 22; *see also* Curl, TR. 64:3–65:12; *BNSF Ry. Co. v. City of Mount Vernon*, TR-070696 (2008); *Burlington N. Santa Fe Ry. v. Snohomish Co*., TR-010194 (2002); *Ferndale,* TR-940330; *BNSF v. Skagit Co.*, TR-940282 (1996); *Spokane Co.*, TR-950177. [↑](#footnote-ref-80)
81. *Mount Vernon*, TR-070696, Final Order on Review, Granting Administrative Review; Modifying Initial to Close Hickox Road Grade Crossing Subject to Conditions at ¶ 60 (emphasis added); *see BNSF v. City of Sprague*, TR-010684, Fourth Supplemental Order ¶ 53 (2003); *see also Skagit County*, TR-940282 (1996) at pg. 4; *Ferndale*, TR-940330; and *Spokane Co. v. Burlington N.*, TR-1148 (1985). [↑](#footnote-ref-81)
82. *BNSF v. Skagit Co.*, TR-940282 (1996), p.7. [↑](#footnote-ref-82)