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

BNSF RAILWAY COMPANY,)	
)	DOCKET NO: TR-150189
Petitioner)	
)	PETITIONER BNSF RAILWAY
vs.)	COMPANY’S POST-HEARING
)	BRIEF
WHATCOM COUNTY,)	
)	
Respondent.)	
)	
_____)	

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INTRODUCTION

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

15 2 When deciding whether to grant a petition to close an existing at-grade public
16 crossing, there are several issues that the Commission has held are outside of its scope of
17 review. First, Commission review does not concern whether the railroad could or should
18 construct its siding track in a different location, or alter its train operations to avoid
19 blocking the existing crossing (as virtually every court addressing the issue, including
20 the Washington Supreme Court, has recognized, state and local attempts to regulate
21 railroad operations are preempted by federal law¹). Second, the Commission does not
22 have authority to perform appellate review of a different agency's SEPA Determination
23 of Nonsignificance for the underlying siding expansion project.² Simply put, for its
24

25 ¹ In 2012, the California Court of Appeals stated: "we have not discovered through our independent
26 research, a single case in which a court considered ICCTA [(Interstate Commerce Commission
27 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).

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

1 analysis, the Commission considers the circumstances at the crossing as they would
2 exist upon construction of the siding.

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

7 **RELIEF REQUESTED**

8
9 BNSF respectfully requests that the Washington Utilities and Transportation
10 Commission grant its petition to close the Valley View public railroad crossing, upon
11 completion of the civil mitigation improvements described below that would precede
12 construction of BNSF's Intalco Yard siding track project.

13 **STATEMENT OF FACTS**

14 **1. Rail transportation is important to Washington's communities.**

15 BNSF Railway Company operates an average of 1,600 trains per day over
16 32,500 route miles across 28 states and three Canadian provinces, including Washington
17 State.³ BNSF transports the products and materials that help feed, clothe, power, and
18 supply communities throughout the country.⁴ Rail transport moves these goods more
19 safely and efficiently, using less fuel, with fewer emissions than trucks on the highway.⁵

22 SEPA determinations." *BNSF Ry. Co. v. City of Mount Vernon*, TR-070696, Order 03 Denying BNSF
23 Motion to Limit Issues and Denying City of Mount Vernon's Motions for Summary Judgment and In
24 Limine ¶ 19 (Oct. 2, 2007). The Commission Staff's counsel agreed: "Staff counsel is unaware of any
25 legal authority that would allow Judge Pearson to issue a new or modified SEPA determination within the
26 confines of the present adjudication. As a general rule, an agency acting on a proposal covered by an
27 existing DNS must use that document 'unchanged.' WAC 197-11-600(3)." Commission Staff's Response
to Bench Request No. 4 (Dec. 4, 2015).

³ Haag, Exh. No. GH-1T, 2:6-11.

⁴ *Id.* at 2:6-11.

⁵ *Id.*

1 BNSF's network includes just over 25,800 grade crossings, and promoting
2 grade-crossing safety is an essential part of BNSF's operation and culture.⁶

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

4 6 As communities grow, the demand for freight and passenger rail services
5 continues to increase.⁷ In order to respond to these market demands, BNSF continually
6 monitors and invests in the capacity of its rail system.⁸ Train tracks are not like a
7 highway; most of the time there is only one set of mainline tracks.⁹ BNSF has installed
8 periodic siding tracks to allow trains traveling in opposite directions to meet and pass
9 each other or to allow higher priority trains like Amtrak and UPS trains to pass.¹⁰ This is
10 necessary on tracks where trains have different priority and speeds, and helps prevent a
11 backlog of trains needing to get through the same stretch of track.¹¹

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

18 8 In 2014, the Pacific Northwest experienced backlogs of trains.¹⁴ Trains destined
19 for the Cherry Point subdivision were delayed due to the absence of suitable siding
20

21 ⁶ <http://www.bnsf.com/communities/safety-and-security/railroad-grade-crossings/>.

22 ⁷ Haag, Exh. No. GH-1T, 2:19–20.

23 ⁸ *Id.* at 2:20.

24 ⁹ *Id.* at 2:20–21.

25 ¹⁰ *Id.* at 2:21–23.

26 ¹¹ Wagner, Exh. No. RW-1T, 4:15–22.

27 ¹² Haag, Exh. No. GH-1T, 2:23–24.

¹³ *Id.* at 6:8–17.

¹⁴ BNSF's Answers to Bench Requests Nos. 1–3 to BNSF, p. 2.

1 tracks.¹⁵ This resulted in backups on the Bellingham subdivision as trains waited to meet
2 trains exiting Cherry Point.¹⁶ It also caused longer gaps between available meet/pass
3 locations for other trains running through Whatcom County.¹⁷

4 9 As Grant Haag, BNSF Terminal Superintendent of the Greater Seattle Terminal
5 Complex, explained:

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

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

20 10 The Valley View Road at-grade crossing is a rural railroad crossing west of
21 Custer in Whatcom County, Washington, on BNSF’s Cherry Point Subdivision.¹⁹ On
22 average, 364 motorists drive across the tracks per day, making Valley View a
23 “low-volume road” per the Manual on Uniform Traffic Control Devices.²⁰ There are
24 adjacent crossings on either side of Valley View (Ham/Arnie Road, and Main Street)

25 ¹⁵ BNSF’s Answers to Bench Requests Nos. 1-3 to BNSF, p. 2.

26 ¹⁶ *Id.* at p. 3.

27 ¹⁷ *Id.*

¹⁸ Haag, Exh. No. GH-1T, 3:1–10.

¹⁹ Exh. No. RW-3CX.

²⁰ Exh. No. KB-3, p. 3; Wagner, Exh. No. RW-1T, 8:26–9:3.

1 within two miles of additional travel.²¹ On average, eight trains per day currently travel
2 through the crossing.²² The train speed limit is 10 miles per hour.²³

3
4 **4. The Intalco Yard siding track extension will improve rail
transportation and cross Valley View Road upon completion.**

5 11 One of BNSF's siding tracks is called the "Intalco Yard" siding track, and it
6 exists to the west of Valley View Road.²⁴ The Intalco Yard siding track is not long
7 enough to place full-length trains. Presently, trains need to go through multiple
8 switching operations to separate the cars and hold portions of a train on shorter yard
9 tracks and the siding track, which increases congestion and road blockages.²⁵ In order to
10 minimize the bottlenecks in the Cherry Point and Bellingham subdivisions described
11 above, and to help improve rail traffic along the entire line, BNSF plans to lengthen the
12 Intalco siding.²⁶

13 12 Upon completion, the Intalco project will allow existing customers in the Cherry
14 Point industrial area to receive and depart full length trains without blocking the main
15 line, switches, or roads, and also minimize the train delays on the Bellingham
16 Subdivision as described above. The project will extend both ends of the current track to

17
18 ²¹ Biolobreski, Exh. No. KB-4, p.7.

19 ²² Haag, Exh. No. GH-1T, 5:26–6:2. As acknowledged at the evidentiary and public hearings, some of
20 BNSF's trains carry crude oil to customers in the Cherry Point subdivision. BNSF is required, by federal
21 law, to transport all kinds of commodities and cannot refuse to transport such products, including crude
22 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>.

23 ²³ Wagner, Exh. No. RW-1T, 7:1–2.

24 ²⁴ Exh. No. KB-3, p. 5.

25 ²⁵ Haag, Exh. No. GH-1T, 4:11–16.

26 ²⁶ While the Commission "has no jurisdiction to affect construction of [a] siding," *see* Order Granting
27 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.

1 create an overall length that is planned to be 7,230 feet.²⁷ Once the project is complete,
2 the siding track will cross Valley View Road. The existing siding and mainline track
3 structures will also be upgraded to improve efficiency and security.²⁸

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

7 ¹³ After the Intalco project is finished, a train or railcars placed onto the siding track
8 could be parked on the siding for hours or more, depending on the customer's needs and
9 other train traffic in the area.²⁹ Valley View road could therefore be blocked for hours.³⁰

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

19 ²⁷ Haag, Exh. No. GH-1T, 5:9-14.

20 ²⁸ *Id.* at 4:19-21.

21 ²⁹ *Id.* at 6:19-22.

22 ³⁰ During the evidentiary hearing, Whatcom County's traffic engineer questioned whether BNSF's trains
23 would be allowed to block a crossing for more than 15 minutes. The Washington Supreme Court has held
24 that municipal codes or local laws that attempt to regulate train traffic, including anti-blocking laws, are
25 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.").

26 ³¹ Haag, Exh. No. GH-1T, 7:1-8.

27 ³² *Id.*

³³ *Id.*

15

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

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

16

11 Lights and gates would not present an acceptable alternative to closure in this
12 particular instance.⁴⁰ As witnesses explained in prefiled testimony, even with lights and
13 gates, drivers may disregard warning devices when they believe the cause for the
14 activation of gates is the nearby train that is not moving.⁴¹ This creates the potential for a
15 driver to violate the warning devices and drive into the path of an oncoming train.⁴²
16 Further, if trains were parked across the road, pedestrians could be tempted to walk
17

18 ³⁴ Neubauer, Exh. No. SN-1T, 5:19–20.

19 ³⁵ *Id.* at 6:1–6.

20 ³⁶ *Id.* at 6:6.

21 ³⁷ *Id.* at 5:20–22.

22 ³⁸ *Id.* at 5:22–24.

23 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,
24 Exh. No. RW-1, 6:17–7:11.

25 ⁴⁰ BNSF explained why closure was proper, as compared to other alternatives. Mr. Wagner explained:
26 “Once a grade crossing is closed/eliminated, the safety hazards I previously discussed are eliminated. It is
27 nearly impossible that the crossing will ever be the site of a vehicle/bicycle train crash, with its
28 accompanying possibility of death, personal injuries, property damage, fires, explosions, and/or hazardous
29 material spills.” Wagner, Exh. No. RW-1, 7:18–22.

30 ⁴¹ Neubauer, Exh. No. SN-1T, 6:26–27; Wagner, Exh. No. RW-1, 6:17–7:11; Haag, Exh. No. GH-1,
31 7:10–20.

32 ⁴² Haag, Exh. No. GH-1, 7:10–20.

1 under, over, near or around the trains, which could present serious or potentially fatal
2 consequences.⁴³ In addition, sometimes motorists drive into the side of parked trains.⁴⁴

3 17 There are a variety of reasons that motorists and pedestrians disregard warning
4 devices, even lights and gates, at a crossing. Driver inattention is a common factor.⁴⁵
5 The train speed limit through the Valley View crossing is 10 miles per hour; drivers,
6 pedestrians, and bicyclists may also underestimate the potential dangers of a
7 slow-moving train, thinking that they have time to try to “beat” the train when they do
8 not.⁴⁶ Impatience also plays into the equation. Drivers, bicyclists, and pedestrians may
9 take more risks when they see a long freight train coming down the tracks, especially at
10 a slow speed, because they do not want to wait for the train to pass.⁴⁷ Mr. Neubauer was
11 a locomotive Engineer for over twenty years, and throughout his career it was almost a
12 daily occurrence for drivers to race to get across the tracks before the train arrived.⁴⁸

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

14 18 As Operation Lifesaver presenter and rail safety witness Mr. Neubauer
15 explained, the weight ratio of a train to a car is about that of a car to a soda can, about
16 4,000 to 1.⁴⁹ Imagining the impact between a car and a soda can shows what sort of
17 effect a train/vehicle collision could have. In vehicle/train collisions, people are about 20
18 percent more likely to die than in vehicle/vehicle collisions, simply because of the
19 weight difference.⁵⁰

22 ⁴³ Haag, Exh. No. GH-1, 7:10–20.

23 ⁴⁴ *Id.*

24 ⁴⁵ Neubauer, Exh. No. SN-1T, 4:17–18.

25 ⁴⁶ *Id.* at 4:18–20.

26 ⁴⁷ *Id.* at 4:21–23.

27 ⁴⁸ *Id.* at 4:10–11.

⁴⁹ *Id.* at 3:24–25.

⁵⁰ *Id.* at 3:27–4:1.

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

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

11 ²⁰ BNSF filed the resulting Traffic Impact Study.⁵⁴ The Study considered safety
12 and diagnostic evaluations at the adjacent crossings, and determined that the alternate
13 crossings could safely accommodate any rerouted traffic, a conclusion that the County

15 ⁵¹ During the public hearing, a number of participants questioned whether BNSF's petition was or should
16 be part of the Gateway Pacific Terminal Project ("GPT"). The Department of Ecology and Army Corp. of
17 Engineers have confirmed that the Intalco Yard project is separate and distinct from the GPT project;
18 BNSF is not attempting to unlawfully "piecemeal" projects, as some of the public commenters suggested.
19 Exh. Nos. PB-3; PB-6. Witness Pierre Bordenave explained the distinction by using the following
20 example:

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

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

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

34 Bordenave, TR. 55:11–22.

35 ⁵² Wagner, Exh. No. RW-1T, 8:16.

36 ⁵³ *Id.* at 8:17–20.

37 ⁵⁴ Biolobreski, Exh. No. KB-2T; Exh. No. KB-3.

1 traffic engineer corroborated.⁵⁵ BNSF's traffic engineer testified that exposure factors
2 in the surrounding area would be reduced upon closure of the Valley View crossing.⁵⁶

3 21 The Traffic Impact Study also noted that closure of the Valley View Road
4 crossing would not prevent emergency responders from meeting their response time
5 goals in the local area, a fact that was confirmed by Fire Chief Hollander at the
6 evidentiary hearing.⁵⁷ Chief Hollander testified that the fire district would consider a
7 policy change to avoid the Valley View crossing even if it remained open, given that it
8 would be subject to long blockages.⁵⁸ In fact, for a number of stations potentially
9 dispatched to an emergency response call, there would be no projected impact on
10 emergency response time.⁵⁹

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

12 22 BNSF also proposed, and offered to fund at no expense to the public, a number of
13 specific mitigation recommendations relating to the crossing closure. During the
14 evidentiary hearing, the County's traffic engineer and BNSF jointly supported the
15 following mitigation proposals:

- 16 • Install flashing lights and gates, pavement markings, and increase signage at the
17 Ham-Arnie crossing.⁶⁰
- 18 • Install signage at Valley View-Arnie Road intersection, specifically one sign at
19 the south approach, one at the east approach, and one at the west approach.⁶¹
- 20 • Redesign the Creasey/Valley View Road intersection to allow design vehicles to
21 turn around (BNSF would submit a specific design to the County, which would
review and approve it).⁶²

22 ⁵⁵ Rutan, TR. 95:6-10.

23 ⁵⁶ Biolobreski, TR. 40:18-23.

24 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.

25 ⁵⁸ Hollander, TR. 104:10-25.

26 ⁵⁹ *Id.* at 113:8-21; 114:9-21.

27 ⁶⁰ Wagner, TR. 25:15-18; Rutan, TR. 77:25-78:4.

⁶¹ Wagner, TR. 26:10-15; Rutan, TR. 79:17-21.

- Install signage at the north approach to the crossing, at the Valley View/Creasey intersection.⁶³
- Keep existing active warning devices and signals at the Main Street crossing.⁶⁴
- Construct a southbound right turn lane at Portal Way and Main Street.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
- Widening the crossing at Ham-Arnie.⁶⁷
- Installing a turnaround north of the Valley View crossing, south of the Creasey Road intersection.⁶⁸
- Signalizing the entire intersection at Main Street and Portal Way.⁶⁹
- Constructing stop refuges at the Main Street crossing.⁷⁰
- Widening the Main Street crossing.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

⁶² Wagner, TR. 28:1-4; Rutan, TR. 83:24-84:3, 87:20-88:10.

⁶³ Wagner, TR. 27:18-25; Rutan, TR. 86:1-5.

⁶⁴ Wagner, TR. 28:22-29:1; Rutan, TR. 86:6-11.

⁶⁵ Wagner, TR. 29:2-5; Rutan, TR. 86:12-16.

⁶⁶ Wagner, TR. 25:19-22; Rutan, TR. 78:21:79:1.

⁶⁷ Wagner, TR. 25:25-26:4; Rutan, TR. 79:2-8.

⁶⁸ Wagner, TR. 28:7-14; Rutan, TR. 84:16-24.

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.

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.

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.

1 turnaround.⁷² BNSF recommended that the public not be allowed access to Valley View
2 on the south approach to the crossing, rendering a turnaround unnecessary.⁷³

3 STATEMENT OF ISSUES

4
5 25 In Washington, closure of a public railroad crossing is proper when the
6 crossing's hazards outweigh the need for it to remain open to public travel. The Valley
7 View Road crossing will become exceptionally hazardous once BNSF completes its
8 siding track extension project; Valley View Road is a low-traffic-volume road, and
9 suitable alternate crossings exist nearby. In light of these factors, the Commission should
10 grant BNSF's closure request.

11 EVIDENCE RELIED UPON

12 26 This brief relies upon testimony at the evidentiary hearing, prefiled testimony,
13 and exhibits in the record, as specifically cited herein.

14 ARGUMENT

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

16 27 RCW 81.53.060 allows railroad companies to petition the Washington Utilities
17 and Transportation Commission when the railroad believes "that the public safety
18 requires" the "closing or discontinuance of an existing highway crossing, and the
19 diversion of travel thereon to another highway or crossing."⁷⁴ The Commission then
20 determines "the convenience and necessity of those using the crossing and whether the
21 need of the crossing is so great that it must be kept open notwithstanding its dangerous
22 condition."⁷⁵ The Commission considers the levels of motor vehicle and train traffic; the

24 ⁷² Rutan, TR. 79:22–80:6.

25 ⁷³ Wagner, TR. 26:16–27:12.

26 ⁷⁴ RCW 81.53.060.

27 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).

1 number of people closure would affect; whether alternative, safer crossings are nearby;
2 and whether those crossings can absorb the additional traffic.⁷⁶

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

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

8 28 Compared to all states, Washington had the 27th-highest number of grade
9 crossing collisions in 2014.⁷⁷ Washington law states that railway-highway crossings
10 must be overpasses or underpasses whenever practicable.⁷⁸ The law also recognizes the
11 need for clear visibility near grade crossings.⁷⁹ The Commission has established a
12 precedent for closing crossings that would bisect siding tracks, because the addition of
13 siding tracks “magnifies the danger presented to vehicular traffic, creating an
14 exceptionally hazardous crossing”⁸⁰

15 29 The Commission has emphasized the dangers at railroad crossings in the middle
16 of siding tracks:

17 [A]t-grade crossings with more than one set of tracks are significantly
18 more dangerous than at-grade crossings with only a single set of tracks.

19
20 ⁷⁶ *Ferndale*, TR-940330; *BNSF v. Skagit Co.*, TR-940282 (1996); *Union Pac. R.R. v. Spokane Co.*,
TR-950177 (1996).

21 ⁷⁷ Neubauer, Exh. No. SN-1T, 4:4–5.

22 ⁷⁸ RCW 81.53.020; *Reines v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 195 Wn. 146, 80 P.2d 406
23 (1938); *State ex rel. Oregon-Washington R.R. & Nav. Co. v. Walla Walla Co.*, 5 Wn.2d 95, 104 P.2d 764
24 (1940). When addressing whether an over- or under-pass is practicable, the commission is directed to
25 consider “the amount and character of travel on the railroad and on the highway; the grade and alignment
26 of the railroad and the highway; the cost of separating grades; the topography of the country, and all other
27 circumstances and conditions naturally involved in such an inquiry.” RCW 81.53.020.

⁷⁹ See RCW 81.53.080 (prohibiting visual obstructions within one hundred feet of a grade crossing).

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.

1 When a siding track creates the potential to obstruct a motorist's view of
2 the main line track, the crossing becomes exceptionally hazardous.⁸¹

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

- 5 • frequent crossing blockages for variable and sometimes extended lengths of
6 time, at unpredictable intervals;
- 7 • trains stopped on the siding but not blocking the crossing, which can dangerously
8 impede sight for motorists using the crossing;
- 9 • incentives for risky driver behavior, such as trying to beat a train before it parks
10 and blocks the crossing—or, after one train passes, bypassing warning devices
11 and being struck by an unexpected second train; and

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

14 30 In this case, Valley View Road will experience each of the above-mentioned
15 hazards after BNSF extends the Intalco siding. As a matter of law, the Valley View Road
16 crossing will become exceptionally hazardous. Neither the County nor Commission
17 Staff contested these facts or conclusions at the hearing.

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

20 31 "Consolidation of crossings necessarily inconveniences those whose crossing is
21 eliminated in favor of adjacent crossings."⁸² The safety risks eclipse the scope of the
22 public's need for the low-traffic-volume Valley View Road crossing. In this case, both
23 BNSF's and the County's traffic engineers concluded that using either of the adjacent
24 crossings will mitigate the closure's inconvenience to the public.

25 ⁸¹ *Mount Vernon*, TR-070696, Final Order on Review, Granting Administrative Review; Modifying
26 Initial to Close Hickox Road Grade Crossing Subject to Conditions at ¶ 60 (emphasis added); see *BNSF v.*
27 *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).

⁸² *BNSF v. Skagit Co.*, TR-940282 (1996), p.7.

1 32 No party rebutted the following facts:

- 2
- 3 • Even if the Valley View Road crossing were to remain open, its unscheduled
- 4 blockages would discourage emergency responders from using the crossing.
- 5 • Closure will not significantly impact other roadways.
- 6 • Emergency response times will still fall within the acceptable range for the fire
- 7 district's response time goals.
- 8 • Mitigating measures, such as upgrading the warning devices at the Ham/Arnie
- 9 crossing and creating a turn lane at the Portal Way/Main Street crossing, can
- 10 ameliorate concerns about closure of the Valley View Road crossing.
- 11 • Continued use of the Valley View Road crossing is not necessary to enable
- 12 emergency responders to protect the health, safety, and welfare of citizens
- residing in the vicinity of the crossing within established response time goals.
- 13 • 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.

13 33 The overwhelming weight of testimony is that the public convenience and

14 necessity do not require that the Valley View Road crossing remain open.

15 CONCLUSION

16 34 The facts set forth above clearly demonstrate that the hazards of keeping the

17 Valley View crossing open outweigh the need for this crossing to remain open to public

18 travel. Therefore, the Commission should grant BNSF's petition and order that the

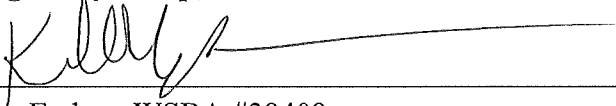
19 Valley View Road crossing in Whatcom County be closed.

20

21 DATED this 8th day of January, 2016.

22

23 **Montgomery Scarp, PLLC**

24 

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4

5
6 **CERTIFICATE OF SERVICE**

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

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


12 Daniel L. Gibson
13 Chief Civil Deputy
14 Prosecuting Attorney
15 Whatcom County
16 311 Grand Ave., Suite 201
17 Bellingham, WA 98225

12 Joseph P. Rutan
13 County Engineer/Interim PW Director
14 Whatcom County Public Works Dept.
15 322 N. Commercial St., Suite 210
16 Bellingham, WA 98225

16 Julian Beattie
17 Assistant Attorney General
18 1400 S. Evergreen Park Drive SW
19 P.O. Box 40128
20 Olympia, WA 98504-0128

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

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

24 
25 _____
26 Pamela Ruggles, Paralegal
27