BEFORE THE WASHINGTON STATE UTILITIES

AND TRANSPORTATION COMMISSION

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| BNSF Railway,  Petitioner,  vs.  WHATCOM COUNTY,  Respondent. | )  )  )  )  )  )  )  )  )  ) | Docket No: TR -150189  Respondent Whatcom County’s Post-Hearing Brief in Opposition to Petitioner BNSF’s Petition for Closure of Valley View Road |

1. Respondent Whatcom County, 311 Grand Ave, Bellingham, WA 98225, by and through its attorney, Chief Civil Deputy Daniel L. Gibson, submits the following post-hearing brief in opposition to the petition of BNSF for closure of Valley View Road, a County road, at its point of intersection with the BNSF railroad tracks south of Creasey Road and north of Arnie Road.

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# FACTS

2. On February 4, 2015, Petitioner BNSF submitted to the Washington Utilities and Transportation Commission its petition to close a portion of Valley View Road, a County road belonging to Whatcom County. That petition for closure at the point of intersection of the railroad tracks and the road, located within BNSF’s Cherry Point Subdivision a short distance west of Custer and west of the mainline of the railroad in BNSF’s Bellingham Subdivision, has been opposed by Whatcom County. This opposition resulted in a hearing on the petition and the receipt of public comment on the proposed closure, the hearing being held at the Whatcom County Courthouse on December 1, 2015.

3. The petition for closure is predicated upon BNSF’s stated intent to construct an expanded siding for railroad cars within the Cherry Point Subdivision, which includes all rail facilities running to and from Cherry Point industrial facilities, beginning at Custer and going generally west and south from that point of diversion. The project to expand the siding facilities west from Custer, through the Valley View intersection to a point a short distance east of the intersection of the railroad with Ham Road, has been referred to throughout these proceedings as the Intalco Yard Improvement Project.

4. In the prefiled testimony submitted prior to the hearing and at the hearing itself on December 1, some of BNSF’s witnesses represented that the anticipated expansion of the siding in this location was necessary to relieve congestion both upon the mainline within the Bellingham Subdivision and upon the mainline within the Cherry Point Subdivision.[[1]](#footnote-1), [[2]](#footnote-2) At least one of BNSF’s witnesses, Pierre Bordenave, testified that the reason for the proposed siding expansion was primarily to relieve congestion upon the Cherry Point Subdivision mainline.[[3]](#footnote-3) The general consensus of BNSF’s witnesses and UTC staff witness Paul Curl, was that closure of Valley View Road at this location was necessary in case of such siding construction because the intersection of track and road was likely to be occupied by railroad cars for extended periods of time and because of increased risks to safety that would arise to the public traveling over these tracks due to interference with visibility and increased risk of collision due to more frequent movement of rail cars into and through the intersection with the County road.[[4]](#footnote-4)

5. The County presented pre-filed testimony from Henry Hollander, Assistant Chief of Whatcom County Fire District #21 (also known as North Whatcom Fire & Rescue Service), that emergency responses to reported fires and calls for Basic Life Support (BLS) services from nearby fire stations that necessitated crossing the railroad tracks in this area could be delayed by up to four more minutes, going from response times of 8 to 10 minutes up to 10 to 12 minutes, though delivery of Advanced Life Support (ALS) services by paramedics from District 7’s station at 1886 Grandview Road was not likely to be significantly affected if the closure occurred.[[5]](#footnote-5)

6. The closure proposed in this case was presented as a stand-alone proposal, so the County has not been informed and is not aware of any other closures throughout this area that may be planned or reasonably anticipated by petitioner BNSF.

7. At the public comment hearing held on the evening of December 1, 2015, numerous persons spoke in virtually unanimous opposition to the petition for closure, citing various environmental concerns if a siding is constructed, as well as inconvenience to motorists who use this portion of Valley View Road on a regular basis and who would be forced to detour to longer, less direct, and thus more time-consuming routes of travel.[[6]](#footnote-6)

# ARGUMENT

8. The position in which the County finds itself procedurally creates a challenge for it in framing a response to BNSF’s petition for closure. The danger attributed to the crossing in question and which is being referenced as justification for closure is the danger associated with the siding expansion across Valley View Road. Valley View Road’s current rail crossing prior to siding expansion does not constitute a particularly hazardous situation. There is no accident history at that crossing at any time in the recent past.[[7]](#footnote-7) Thus, based upon current conditions, the benefit derived by through-access on Valley View across the single set of tracks appears to outweigh the present danger. However, the County has no meaningful permit authority over BNSF’s proposed siding construction. It understands, as confirmed by UTC staff member Paul Curl in his pre-filed testimony, that the UTC’s authority is directed to the question of whether or not Valley View Road should be closed in light of BNSF’s stated intent to construct a siding, and not the question of whether the siding should be constructed.[[8]](#footnote-8),[[9]](#footnote-9) Thus regardless of the outcome of this particular petition, the siding could be constructed if authorizations for the proposed construction are obtained from permitting authorities who are not parties to this proceeding. If that happens, the County and members of the public using Valley View Road are faced with traffic safety issues regardless of whether siding construction was warranted from the standpoint of functional necessity for the railroad.

9. Having said that, and having acknowledged these external realities, the County remains opposed to the closure of Valley View Road for a variety of reasons, primarily arising from a lack of good information pertaining to the necessity of the siding itself and thus on the necessity of the closure to accommodate a siding for which no clear warrant exists.

## Absence of good information on necessity of closure because of minimal data on actual need for siding expansion

10. Other than the number of trains that travel to and from Cherry Point on a daily basis, which we understand to be ordinarily four units in and four units out per day, for a total of about 56 full unit crossings during the course of a week (8 trains x 7 days/wk.),[[10]](#footnote-10) we are faced with a lack of good actual or predictive quantification of train traffic that is utilizing or will utilize the fully expanded siding proposed to cross Valley View Road. Good judgment on the actual necessity of closure for traffic safety reasons should flow from good information on the frequency with which train cars, moving or parked, would interfere with road traffic at the point of proposed closure, and at this juncture we simply do not have that good information. We have relatively bare allegations of necessity based upon generalized information about the desirability of having a relief valve for the railroad mainlines in the form of an expanded siding at this location, due to petitioner’s self-reported events of rail traffic congestion that are not quantified in any meaningful sense. These allegations of necessity may or may not be correct, but should not serve as the basis for a decision to mandate road closure until they are substantiated to a further degree than has occurred to date.

11. This absence of specificity supporting the need for additional siding space appears to have been recognized by Judge Pearson in her Bench Request No. 3, in which she inquired whether trains were delayed or backlogged in Whatcom County in 2014, and if so, what commodities those backlogged trains were carrying.[[11]](#footnote-11) The response provided by Ms. Endres, counsel for petitioner, is an unsworn narrative summary that basically repeats the testimony of BNSF’s witnesses.[[12]](#footnote-12) It is general in nature, with no quantification whatsoever of the frequency, duration, or severity of backlogs. These observations are not intended to call into question counsel’s credibility, but to make the point that she is reciting what others have told her, without any additional quantification of the alleged problems.

## Regional transportation planning by the County is rendered more difficult by lack of information from BNSF as to road closures that may be sought in the future.

12. From a regional traffic planning perspective, the lack of information from the petitioner regarding future closure possibilities presents the County with a further challenge. The petitioner has presented to the UTC a picture of significant and on-going expansion in regional rail traffic and thus likely a continuing need for construction of additional rail facilities. If the Valley View closure is to be the only such closure sought for a considerable period of time in this area, that is one thing. But if additional closures are to be sought in this region, we may be faced with a situation in which the Valley View closure becomes a greater burden because the road is no longer available as a possible solution to movement of road traffic in this area and because road resources have been shifted elsewhere in the aftermath of the closure. We recognize the challenge that this longer-range planning presents to the petitioner. Yet, good decision making in cases like this is dependent upon better and more complete information about rail traffic and associated facilities than the petitioner has presented thus far. The County at the same time recognizes that in past UTC cases, possible future needs are treated as too speculative to be taken into consideration in the immediate closure decision.[[13]](#footnote-13), [[14]](#footnote-14)

## Impacts upon emergency service delivery in comparison to considerations of public safety resulting from closure

13. Finally, in regard to the impact of the closure upon delivery of emergency services to locations in proximity to the closure, the petition for closure should only be granted if actual necessity warrants closure. Petitioner has made the point that service delivery time to this area would, in any event, be within Fire District No. 21’s self-defined standard of response time (less than 12 minutes for 80% of call responses). Nonetheless, any externally-caused delay should be imposed only for a corresponding greater good. In the absence of clear necessity for the construction of a siding expansion at this point, there is no sound basis upon which to determine that the good to be served by closure outweighs the burden to the public resulting from delays in delivery of critical public services. Thus on the record before the UTC at present, the County requests that the petition for closure be denied.

# MITIGATION

14. If the UTC grants, however, the petition for closure of Valley View Road at the point of intersection with the expanded rail crossing, there remains the issue of what mitigation should be required of BNSF. The areas where mitigation have been proposed by one party or another in this case, and the extent of that proposed mitigation, is as follows:

1. Ham Road rail crossing:
2. Gates, flashing lights, pavement markings, stop lines, increased signage -- agreed
3. UTC-proposed stop refuges -- not agreed by petitioner, not deemed necessary by County
4. UTC-proposed widening of crossing, approach to crossing -- not agreed by petitioner, not deemed necessary by County.[[15]](#footnote-15)
5. South approach to Valley View crossing from Arnie Road:
6. proper signage -- generally agreed
7. cul-de-sac originally proposed by petitioner, but subsequently withdrawn
8. hammerhead turn-around recommended by County, but not agreed by petitioner.[[16]](#footnote-16)

3. North approach to Valley View from Portal Way through Creasey Road:

1. proper signage -- agreed
2. turnaround at Creasey that meets County design requirements – agreed
3. locked gate on Valley View south of Creasey -- rejected by County
4. cul-de-sac just north of rail crossing on Valley View -- not agreed by petitioner and not deemed necessary by County.[[17]](#footnote-17)

4. Custer Main Street/Portal Way intersection/crossing

1. south-bound right turn lane on Portal Way, onto west-bound Main Street -- agreed
2. further widening of Main Street crossing and approaches -- not agreed by BNSF and not deemed necessary by County.[[18]](#footnote-18)

15. The one real point of difference between BNSF and the County appears to be the question of the turnaround for the southern approach to the crossing on Valley View from Arnie Road. This is a feature that Mr. Rutan testified is required by the Manual of Uniform Traffic Control Devices (MUTCD), and is certainly a modest request from the County which has been entirely reasonable in its positions on mitigation for this closure request if granted. This feature should thus be required of petitioner as mitigation for the closure.

Dated this 8th day of January, 2016.

Respectfully submitted,

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Daniel L. Gibson

Chief Civil Deputy Prosecuting Attorney

For Respondent Whatcom County

1. Wagner, TR Vol. II, 19:1-14 [↑](#footnote-ref-1)
2. Haag, TR Vol. II, 32:2 – 23 [↑](#footnote-ref-2)
3. Bordenave, TR Vol. II, 55:15 – 24 [↑](#footnote-ref-3)
4. Curl, TR Vol. II, 64:3 – 65:12 [↑](#footnote-ref-4)
5. Exhibit HH-1T, Rebuttal Testimony of Henry Hollander, pp. 1-3. [↑](#footnote-ref-5)
6. TR, Vol. III, pp. 134-185. [↑](#footnote-ref-6)
7. Exhibit KB-3T, p. 3 (Supplemental Prefiled Testimony of Kurt Bialobreski). [↑](#footnote-ref-7)
8. Exhibit PC-1T (Testimony of Paul Curl), p. 13. [↑](#footnote-ref-8)
9. Because of the Commission’s and his role, Mr. Curl appears to accept the petitioner’s representation that the siding expansion across Valley View Road is necessary, and thus that the creation of a more dangerous condition (absent closure) by such expansion is warranted. The County’s position is that there should be a threshold determination of warrant for the expansion, not for the purpose of inserting the UTC into permitting of the construction but for the purposes of addressing whether the creation of a dangerous condition arising from the intended expansion is truly necessary, and not the petitioner’s self-created problem. It is reasonable to assume that ordinarily, for sound economic reasons, a railroad will propose additional siding construction only where it believes that it is genuinely warranted. However, in this case, given the possible presence of other motivations, i.e., future development by potential additional customers in the Cherry Point Subdivision, it is fair to examine the proffered justification for siding expansion with closer scrutiny, to determine whether the generalized allegations of necessity are supported by quantifiable data. The County is not suggesting that such data cannot be supplied, but only notes that in the course of proposing this expansion, petitioner’s own message on the scope of the problem it seeks to remedy has been mixed, and lacks data that specifically quantifies the necessity of its plan. The County also recognizes that the UTC and its staff has historically interpreted its role in light of the statutes pertaining to closure, RCW 81.53.020 and .060, and the associated case law, to exclude consideration of the necessity of siding expansion/construction when calculating the danger posed by the proposal. [↑](#footnote-ref-9)
10. Haag, TR Vol. II, 32:13-23. [↑](#footnote-ref-10)
11. Haag, TR, Vol. II, 35:4-16; 131:8-14. [↑](#footnote-ref-11)
12. BNSF’s Answers to Bench Request Nos. 1-3, pp. 2, 3, submitted by Kelsey Endres on December 11, 2015. [↑](#footnote-ref-12)
13. *TR-940330, BNSF v. City of Ferndale (Thornton Rd.)*. [↑](#footnote-ref-13)
14. Exhibit PC-7, p. 30 of 137. [↑](#footnote-ref-14)
15. Wagner, TR Volume II, 25:15-25, 26:1-4; Curl, TR Vol II, 68:1-71:22; Rutan, TR Vol. II, 77:1-79:11. [↑](#footnote-ref-15)
16. Wagner, TR Volume II, 26:1 – 27:17; Rutan, TR Vol. II, 79:1-83:6. [↑](#footnote-ref-16)
17. Wagner, TR Vol. II, 27:1 – 28:21; Curl, TR Vol. II, 61:1 – 63:12, 74:1-75:16; Rutan, TR Vol. II, 83:1-86:5. [↑](#footnote-ref-17)
18. Wagner, TR Vol. II, 28:1 – 29:25; Curl, TR Vol. II, 66:1 – 68:21; Rutan, TR Vol. II, 86:1 – 88:10. [↑](#footnote-ref-18)