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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

BURLINGTON NORTHERN RAILROAD)
COMPANY,)
) DOCKET NO. TR-940330
)
) Petitioner,)
)
) vs.)
)
) CITY OF FERNDAL, WASHINGTON,)
)
) Respondent.)
)

COMES NOW Respondent CITY OF FERNDAL and respectfully
submits its Petition for Administrative Review pursuant to WAC
480-09-780 in the format required by WAC 480-09-780(4).

I.

A. Nature of Challenge re Importance, Relevance and
Availability of Petitioner's Reasons for Selecting Thornton Road

for Siding: The Initial Order states that the Petition of the
Burlington Northern Railroad Company alleges "that the proposed
Amtrak (passenger train) service through Ferndale will require
an extension to the siding track at Thornton Road." (Page 2 -
first three lines). This alleged requirement and its consequent
need to split trains for one Amtrak trip each day for the next

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1 two years is the main safety consideration leading to the
2 Initial Order to close the crossing. Yet Burlington Northern
3 did not establish at the hearing the need to put the siding at
4 Thornton Road. As discussed in detail in the City's Brief,
5 someone unknown to the City apparently decided for economic
6 reasons to consider only areas where partial sidings already
7 exist to locate the new 8600 foot long siding the Petitioner
8 desires to build. The undisputed present City plan and the
9 articulated present need to have a Thornton Road connector built
10 when funding can be obtained must be balanced against the
11 economic impact on Petitioner to locate the siding in another
12 location north of Ferndale. In order to balance these competing
13 interests, there must be some accountability and meaningful
14 explanation from Petitioner, other than a listing of the general
15 considerations involved, as to why the 8600 foot siding is
16 required to be at Thornton Road rather than north of Ferndale.
17 The witness offered by Petitioner, Mr. Marvin Nelson, did not
18 know, when asked specifically, why other alternatives were
19 rejected or how much more other alternatives would cost, except
20 to say that locations where partial sidings were already in
21 place were the ones considered. He did not have any idea how
22 much it would inconvenience or cost Petitioner to use the
23 existing tracks to the refineries for this purpose and only
24 spoke in general terms as to factors Petitioner decided to
25 utilize to make its choice, without any balancing of the
26 environmental and economic advantages of the other alternatives
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1 and without any knowledge of the adverse environmental and
2 economic effects of this particular choice upon the motoring
3 public.

4 When City Manager Stan Strebels heard that the selection
5 process was limited to locations with existing sidings for the
6 first time at the hearing, he learned for the first time how
7 unfair the process was to the City and the public because it was
8 apparently aimed at saving the Petitioner some unknown amount of
9 money at a public expense of at least \$2 million plus untold
10 injuries and inconveniences that loss of the Thornton connector
11 will cause. Petitioner had not disclosed this reason for the
12 selection of the location to the City before the hearing and the
13 City had no reason to believe the selection process was being so
14 narrowly limited contrary to what it was led to believe prior to
15 the hearing.

16 When the City moved to reopen the hearing to allow
17 Petitioner to better explain why the Thornton Road location was
18 really needed for the 8600 foot siding as alleged in the
19 Petition, instead of taking the opportunity to substantiate and
20 justify its choice, Petitioner instead resisted. Petitioner
21 resisted by asserting that the City should be penalized for not
22 knowing in advance that Petitioner's need for the Thornton Road
23 location really would not be adequately explained or established
24 at the hearing and would be based upon a decisional process and
25 criteria that the City had not been apprised of prior to the
26 hearing.

1 The Initial Order accepts that objection to the request for
2 a more meaningful explanation of the alleged necessity to place
3 the 8600 foot long siding at Thornton Road, which is a major
4 basis used to request the closing of the crossing. In other
5 words, the Initial Order allows Petitioner to create an unsafe
6 crossing by locating an 8600 foot siding at Thornton Road
7 without any meaningful explanation of why other alternatives
8 were rejected other than very general considerations involved.
9 Petitioner alleged the need for the extended siding at the
10 Thornton Road location and devoted considerable testimony to the
11 safety problems it would create relating to the splitting of
12 trains because its alleged need for the siding at that location
13 was the main reason for its claim that the crossing would be
14 unsafe. The City devoted considerable attention to this issue in
15 its Brief and could not cite authority confirming that this
16 issue is properly before the Commission because it is a factual
17 matter alleged by the Petitioner, not the City, to support its
18 Petition to close the crossing for safety reasons rather than a
19 legal principle. This is shown by the fact that the Initial
20 Order concludes that the crossing should be closed in the
21 interest of public safety based in part on "the fact that this
22 crossing will soon experience increased use as a passing track,
23 the switching activity which will occur over the crossing..."
24 (Page 8 - third paragraph, last sentence). The burden of citing
25 authority and of anticipating the inability or unwillingness of
26 the Petitioner to adequately explain at the hearing or
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1 thereafter why other specific alternatives are not available is
2 unfairly shifted to the Respondent City by the Initial Order
3 (Page 3 - second and third paragraphs). The general answers as
4 to specific alternatives offered at the hearing and the
5 opposition to an invitation to provide more informative answers
6 through a reopening process suggests that the location was
7 selected for economic concerns of an unknown magnitude which may
8 or may not outweigh the City's economic concerns.

9 **B. Evidence Relief Upon:** The testimony of Marvin Nelson,
10 senior manager of engineering for Burlington Northern.

11 **C. Nature of Remedy Urged:** The preferred remedy would be to
12 determine from the record that Petitioner has not established
13 the allegation "that the proposed Amtrak (passenger train)
14 service through Ferndale will require an extension to the siding
15 track at Thornton Road" so as to necessitate the closure of the
16 crossing for safety reasons, but that a signalized gate and crew
17 member to flag traffic over the crossing while the train is
18 split, which is to be required as a condition of the requested
19 speed increases, will alleviate any safety concerns without
20 forcing a closure of the crossing, regardless of whether or not
21 an 8600 foot siding is constructed there. Alternatively,
22 Respondent's Petition for Reopening should be granted so as to
23 allow for an adequate showing by Petitioner of the need for the
24 8600 foot siding at Thornton Road rather than at other viable
25 locations north of the City.

1 **D. Recommended Conclusion of Law, Order and Motion**
2 **Determination:**

3 a) Change Conclusion of Law No. 3 and Order to read:
4 "The Petition of Burlington Northern Railroad Company for
5 closure of the at-grade crossing at Thornton Road in the City of
6 Ferndale is denied for the reason that the conditions placed
7 upon the granting of speed increases in that area will satisfy
8 safety concerns and there is a present need for said crossing to
9 remain open for the construction of a Thornton Road connector at
10 least until such time that railroad concerns or safety concerns
11 outweigh the City's identified transportation plan needs.

12 b) Alternatively, substitute for the first two
13 paragraphs on Page 3: "Based on the Affidavit of Stan Strebels,
14 Respondent City of Ferndale's Petition for Reopening is granted
15 in order to allow Petitioner the opportunity to explain the
16 economic and environmental factors that require locating the
17 8600 foot siding at Thornton Road rather than north of Grandview
18 Road. Findings of Fact, Conclusions of Law and an Order will be
19 entered after said information is provided to all parties and
20 they have been allowed ten days to submit their comments to the
21 Administrative Law Judge."

22 **II.**

23 **A. Nature of Challenge re Lack of Showing of Present Public**
24 **Need for Crossing to Remain Open:** The Initial Order finds "that
25 there is no present public need or convenience which is served
26 by the grade crossing at Thornton Road" (Page 6 - last
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1 paragraph); "the City is always entitled to petition the
2 Commission to open a grade crossing should the public need for
3 it arise" (Page 7 - first paragraph, last sentence); "this
4 initial order would not be persuaded that the likely future use
5 of the grade crossing is anything more than speculative and
6 highly uncertain" (Page 7 - second paragraph); "the desire of
7 the City to keep its options open for use of the crossing is not
8 a present public need served by the crossing. Other options
9 remain open to Ferndale regarding its traffic flow problems"
10 (Page 7 - third paragraph, second and third sentences); and "The
11 extension would intersect with Portal Way within 80 feet of the
12 freeway interchange, making traffic very congested..." (Page 10
13 - Finding of Fact No. 9, third sentence).

14 The undisputed evidence is that there has been a need to
15 construct or prepare to construct the Thornton Road connector
16 for many years and that the City has purchased the necessary
17 property for that purpose and has declared the need for the
18 connector to be a priority for many years past. It is a past,
19 present and future public need. A street does not become a
20 public need only when it is funded. The purpose of
21 transportation planning is to identify present needs and seek
22 funding for them. The evidence is undisputed as to the extreme
23 importance that has been given to this improvement over the past
24 years. That fact is not easily discounted. Even the Initial
25 Order recognizes that "this order does not need to decide the
26 best plan for the City to follow--that is uniquely the provence
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1 [sic.] of the City government." (Page 6--second paragraph, last
2 sentence). There is no public safety concern at this time.
3 Petitioner seeks permission to create a public safety concern by
4 increased train speeds and construction of an 8600 foot siding
5 at the least expensive location, but even that will not create a
6 safety hazard if as a condition of the increased speeds the
7 Petitioner is required to install a signalized gate and have a
8 crew member flag traffic over the crossing while the train is
9 split.

10 The City will not in fact be able to expect to have the
11 crossing opened in the future if it is now closed because it
12 would have obvious pitfalls in making funding requests to
13 improve a street over a closed crossing and the Petitioner will
14 likely modify and use the crossing if it is closed in a way that
15 will probably prevent it from again being safely opened in the
16 future. And this would be true even if this pilot project fails
17 and the 8600 foot siding in a few years is only used for freight
18 purposes. On the other hand, improving the crossing and leaving
19 it open for two years for only one passenger trip per day does
20 not irrevocably commit any of the parties. Nor does it damage
21 the public by irrevocably committing to other uses its most
22 feasible and least expensive traffic connector to the freeway
23 for the north part of the City.

24 The likely future use of the grade crossing is no more
25 speculative and uncertain than the success and continued funding
26 of the swift railway pilot project. Funding is the only unknown
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1 in both instances. If the crossing remains open, at least the
2 City will be able to make incremental improvements with traffic
3 impact fees and possibly with State or Federal matching funds.
4 To close the crossing will irrevocably deny the City the
5 opportunity to realize this needed improvement. Although there
6 are other options, the testimony is that the Thornton Road at-
7 grade connector is the most feasible option because it is the
8 least expensive and can be accomplished incrementally.

9 The record is clear that only under one of the alternatives
10 would the extension intersect with Portal Way within 80 feet of
11 the freeway interchange and the possibility of moving the
12 intersection further away would be entertained at the
13 engineering design phase.

14 **B. Evidence Relied Upon:** Exhibits 14, 15, 16 and 17; all of
15 the City's witnesses listed in Finding of Fact No. 5 and the
16 public testimony.

17 **C. Nature of Remedy Urged:** The preferred remedy would be to
18 delete the negative findings or observations quoted above and
19 otherwise appearing in the Initial Order and find that the
20 public safety does not require the crossing to be closed or that
21 the public convenience outweighs the danger of the crossing in
22 light of conditions that are to be placed upon the approval of
23 speed increases. Alternatively, Respondent's Petition for
24 Reopening should be granted so that the Commission will know how
25 alternative siding locations compare economically and
26 environmentally with the Thornton Road location so there can be

1 a meaningful weighing of the need, if any, to create safety
2 issues by locating it there against the public harm and safety
3 issue that will result from locating it there.

4 **D. Recommended Conclusion of Law, Order and Motion**
5 **Determination:** Same as in I. D.

6 III.

7 **A. Nature of Challenge re Inapplicability of Growth Management**

8 **Act:** The Initial Order states "RCW 36.70A.103 provides, in
9 general terms, that actions of State agencies may not contravene
10 comprehensive plans adopted in accordance with the Growth
11 Management Act. However, Ferndale has not adopted a
12 comprehensive plan, so this argument has no bearing on this
13 case." (Page 8 - second paragraph).

14 The testimony is undisputed that the draft
15 transportation element of the City's Growth Management Plan
16 declares the at-grade Thornton Road connector to be the most
17 feasible of the three possible alternative solutions to the
18 City's past, present and future transportation problems. The
19 testimony is also undisputed that the City Council agrees on
20 this point. The Initial Order notes that "The City has a draft
21 transportation plan which will likely be submitted to and acted
22 on by the City Council this year." (Page 9 - Finding of Fact
23 No. 8, first sentence). It is likely, therefore, that any order
24 finally closing or thereafter implementing the closure of the
25 Thornton Road crossing will contravene the City's plan. Form
26 should not rule over substance. Whether or not the City's
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1 adoption of its plan precedes a final order of closure of the
2 crossing or is a few days or weeks later does not change the
3 fact that the weight of evidence establishes that the closure
4 will be in contravention of the City's plan when it is adopted.

5 **B. Evidence Relied Upon:** Exhibit 17; testimony of City Council
6 members Yvonne Goldsmith and Darrell Ashe.

7 **C. Nature of Remedy Urged:** The remedy urged would be to find
8 that the closure of the Thornton Road crossing would likely
9 violate the City's transportation element of its Growth
10 Management Act comprehensive plan when it is adopted in the
11 foreseeable future, that the closure is therefore prohibited by
12 the spirit and intent of RCW 36.70A.103, and that the Petition
13 is therefore denied.

14 **D. Recommended Finding, Conclusion of Law and Order:**

15 a) Change finding on page 8, second paragraph, last
16 sentence, to read: "Since the City will in the near future
17 likely be adopting the transportation element of its Growth
18 Management Act comprehensive plan which designates the Thornton
19 Road at-grade connector as the City's most feasible solution to
20 its transportation problems, any action taken to implement a
21 closure of that crossing would be contrary to the spirit and
22 intent of RCW 36.70A.103."

23 b) Change Conclusion of Law No. 3 and Order to read:
24 "The Petition of Burlington Northern Railroad Company for
25 closure of the at-grade crossing at Thornton Road in the City of
26 Ferndale is denied for the reason that the conditions placed
27

1 upon the granting of speed increases in that area will satisfy
2 safety concerns and the closure of that crossing would be
3 contrary to the spirit and intent of RCW 36.70A.103."

4 DATED this 7th day of December, 1994.

5
6 Respectfully submitted,

7 

8 _____
9 GARY M. CUILLIER, WSBA #3633
10 of Langabeer, Tull & Cuillier, P.S.
11 Attorneys for Respondent CITY OF
12 FERNDALÉ, WASHINGTON
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1 **CERTIFICATE**

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3 I hereby certify that I have this day served the foregoing
4 document upon all parties of record in this proceeding by
5 depositing a true copy thereof in the United States mail,
6 addressed as shown on the annexed Service List, with first class
7 postage prepaid, as authorized pursuant to WAC 480-09-120(2).

8 DATED December 7, 1994.

9
10 
11 Gloria Prugo

12 **SERVICE LIST**

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