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BEFORE THE WASHINGTON STATE UTILITIES
AND TRANSPORTATION COMMISSION

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

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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1 siding expansion was primarily to relieve congestion upon the Cherry Point Subdivision
2 mainline.³ The general consensus of BNSF's witnesses and UTC staff witness Paul Curl, was
3 that closure of Valley View Road at this location was necessary in case of such siding
4 construction because the intersection of track and road was likely to be occupied by railroad
5 cars for extended periods of time and because of increased risks to safety that would arise to
6 the public traveling over these tracks due to interference with visibility and increased risk of
7 collision due to more frequent movement of rail cars into and through the intersection with the
8 County road.⁴

9 5. The County presented pre-filed testimony from Henry Hollander, Assistant Chief of
10 Whatcom County Fire District #21 (also known as North Whatcom Fire & Rescue Service),
11 that emergency responses to reported fires and calls for Basic Life Support (BLS) services
12 from nearby fire stations that necessitated crossing the railroad tracks in this area could be
13 delayed by up to four more minutes, going from response times of 8 to 10 minutes up to 10 to
14 12 minutes, though delivery of Advanced Life Support (ALS) services by paramedics from
15 District 7's station at 1886 Grandview Road was not likely to be significantly affected if the
16 closure occurred.⁵

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

21 7. At the public comment hearing held on the evening of December 1, 2015, numerous
22 persons spoke in virtually unanimous opposition to the petition for closure, citing various
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24 ³ Bordenave, TR Vol. II, 55:15 – 24

25 ⁴ Curl, TR Vol. II, 64:3 – 65:12

⁵ Exhibit HH-1T, Rebuttal Testimony of Henry Hollander, pp. 1-3.

1 environmental concerns if a siding is constructed, as well as inconvenience to motorists who
2 use this portion of Valley View Road on a regular basis and who would be forced to detour to
3 longer, less direct, and thus more time-consuming routes of travel.⁶

4 ARGUMENT

5 8. The position in which the County finds itself procedurally creates a challenge for it in
6 framing a response to BNSF's petition for closure. The danger attributed to the crossing in
7 question and which is being referenced as justification for closure is the danger associated with
8 the siding expansion across Valley View Road. Valley View Road's current rail crossing prior
9 to siding expansion does not constitute a particularly hazardous situation. There is no accident
10 history at that crossing at any time in the recent past.⁷ Thus, based upon current conditions, the
11 benefit derived by through-access on Valley View across the single set of tracks appears to
12 outweigh the present danger. However, the County has no meaningful permit authority over
13 BNSF's proposed siding construction. It understands, as confirmed by UTC staff member Paul
14 Curl in his pre-filed testimony, that the UTC's authority is directed to the question of whether
15 or not Valley View Road should be closed in light of BNSF's stated intent to construct a
16 siding, and not the question of whether the siding should be constructed.^{8,9} Thus regardless of
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20 ⁶ TR, Vol. III, pp. 134-185.

21 ⁷ Exhibit KB-3T, p. 3 (Supplemental Prefiled Testimony of Kurt Bialobreski).

22 ⁸ Exhibit PC-1T (Testimony of Paul Curl), p. 13.

23 ⁹ Because of the Commission's and his role, Mr. Curl appears to accept the petitioner's representation that the
24 siding expansion across Valley View Road is necessary, and thus that the creation of a more dangerous condition
25 (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

1 the outcome of this particular petition, the siding could be constructed if authorizations for the
2 proposed construction are obtained from permitting authorities who are not parties to this
3 proceeding. If that happens, the County and members of the public using Valley View Road
4 are faced with traffic safety issues regardless of whether siding construction was warranted
5 from the standpoint of functional necessity for the railroad.

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

10
11 1. *Absence of good information on necessity of closure because of minimal data on*
12 *actual need for siding expansion*

13 10. Other than the number of trains that travel to and from Cherry Point on a daily basis,
14 which we understand to be ordinarily four units in and four units out per day, for a total of
15 about 56 full unit crossings during the course of a week (8 trains x 7 days/wk.),¹⁰ we are faced
16 with a lack of good actual or predictive quantification of train traffic that is utilizing or will
17 utilize the fully expanded siding proposed to cross Valley View Road. Good judgment on the
18 actual necessity of closure for traffic safety reasons should flow from good information on the
19 frequency with which train cars, moving or parked, would interfere with road traffic at the
20 point of proposed closure, and at this juncture we simply do not have that good information.

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23 justification for siding expansion with closer scrutiny, to determine whether the generalized allegations of necessity
24 are supported by quantifiable data. The County is not suggesting that such data cannot be supplied, but only notes
25 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.

¹⁰ Haag, TR Vol. II, 32:13-23.

1 We have relatively bare allegations of necessity based upon generalized information about the
2 desirability of having a relief valve for the railroad mainlines in the form of an expanded siding
3 at this location, due to petitioner's self-reported events of rail traffic congestion that are not
4 quantified in any meaningful sense. These allegations of necessity may or may not be correct,
5 but should not serve as the basis for a decision to mandate road closure until they are
6 substantiated to a further degree than has occurred to date.

7 11. This absence of specificity supporting the need for additional siding space appears to
8 have been recognized by Judge Pearson in her Bench Request No. 3, in which she inquired
9 whether trains were delayed or backlogged in Whatcom County in 2014, and if so, what
10 commodities those backlogged trains were carrying.¹¹ The response provided by Ms. Endres,
11 counsel for petitioner, is an unsworn narrative summary that basically repeats the testimony of
12 BNSF's witnesses.¹² It is general in nature, with no quantification whatsoever of the
13 frequency, duration, or severity of backlogs. These observations are not intended to call into
14 question counsel's credibility, but to make the point that she is reciting what others have told
15 her, without any additional quantification of the alleged problems.
16

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

19 12. From a regional traffic planning perspective, the lack of information from the petitioner
20 regarding future closure possibilities presents the County with a further challenge. The
21 petitioner has presented to the UTC a picture of significant and on-going expansion in regional
22 rail traffic and thus likely a continuing need for construction of additional rail facilities. If the
23 Valley View closure is to be the only such closure sought for a considerable period of time in
24

25 ¹¹ Haag, TR, Vol. II, 35:4-16; 131:8-14.

¹² BNSF's Answers to Bench Request Nos. 1-3, pp. 2, 3, submitted by Kelsey Endres on December 11, 2015.

1 this area, that is one thing. But if additional closures are to be sought in this region, we may be
2 faced with a situation in which the Valley View closure becomes a greater burden because the
3 road is no longer available as a possible solution to movement of road traffic in this area and
4 because road resources have been shifted elsewhere in the aftermath of the closure. We
5 recognize the challenge that this longer-range planning presents to the petitioner. Yet, good
6 decision making in cases like this is dependent upon better and more complete information
7 about rail traffic and associated facilities than the petitioner has presented thus far. The County
8 at the same time recognizes that in past UTC cases, possible future needs are treated as too
9 speculative to be taken into consideration in the immediate closure decision.^{13, 14}

10 3. *Impacts upon emergency service delivery in comparison to considerations of public*
11 *safety resulting from closure*

12 13. Finally, in regard to the impact of the closure upon delivery of emergency services to
13 locations in proximity to the closure, the petition for closure should only be granted if actual
14 necessity warrants closure. Petitioner has made the point that service delivery time to this area
15 would, in any event, be within Fire District No. 21's self-defined standard of response time
16 (less than 12 minutes for 80% of call responses). Nonetheless, any externally-caused delay
17 should be imposed only for a corresponding greater good. In the absence of clear necessity for
18 the construction of a siding expansion at this point, there is no sound basis upon which to
19 determine that the good to be served by closure outweighs the burden to the public resulting
20 from delays in delivery of critical public services. Thus on the record before the UTC at
21 present, the County requests that the petition for closure be denied.
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25 ¹³ TR-940330, *BNSF v. City of Ferndale (Thornton Rd.)*.

¹⁴ Exhibit PC-7, p. 30 of 137.

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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:
 - a. Gates, flashing lights, pavement markings, stop lines, increased signage -- agreed
 - b. UTC-proposed stop refuges -- not agreed by petitioner, not deemed necessary by County
 - c. UTC-proposed widening of crossing, approach to crossing -- not agreed by petitioner, not deemed necessary by County.¹⁵
2. South approach to Valley View crossing from Arnie Road:
 - a. proper signage -- generally agreed
 - b. cul-de-sac originally proposed by petitioner, but subsequently withdrawn
 - c. hammerhead turn-around recommended by County, but not agreed by petitioner.¹⁶
3. North approach to Valley View from Portal Way through Creasey Road:
 - a. proper signage -- agreed
 - b. turnaround at Creasey that meets County design requirements -- agreed
 - c. locked gate on Valley View south of Creasey -- rejected by County
 - d. cul-de-sac just north of rail crossing on Valley View -- not agreed by petitioner and not deemed necessary by County.¹⁷
4. Custer Main Street/Portal Way intersection/crossing
 - a. south-bound right turn lane on Portal Way, onto west-bound Main Street -- agreed
 - b. further widening of Main Street crossing and approaches -- not agreed by BNSF and not deemed necessary by County.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

24 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.

25 ¹⁶ Wagner, TR Volume II, 26:1 – 27:17; Rutan, TR Vol. II, 79:1-83:6.

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.

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.

1 Arnie Road. This is a feature that Mr. Rutan testified is required by the Manual of Uniform
2 Traffic Control Devices (MUTCD), and is certainly a modest request from the County which
3 has been entirely reasonable in its positions on mitigation for this closure request if granted.
4 This feature should thus be required of petitioner as mitigation for the closure.

5
6 Dated this 8th day of January, 2016.

7 Respectfully submitted,

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10 Daniel L. Gibson
11 Chief Civil Deputy Prosecuting Attorney
12 For Respondent Whatcom County
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