

Exhibit No. ____ -T (PC-1T)
Docket No. TR-070696
Witness: Paul Curl

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent.

DOCKET NO. TR-070696

**TESTIMONY
OF
PAUL CURL**

**ON BEHALF OF THE STAFF OF
THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION**

November 5, 2007

1 **Q. Please state your name and business address.**

2 A. My name is Paul Curl and my business address is 1300 South Evergreen Park Drive
3 Southwest, Olympia, Washington 98504-7250.

4

5 **Q. By whom are you employed and in what capacity?**

6 A. I have worked at the Commission for over 33 years. From May 1974 to June 1986, I
7 worked in a number of positions in the Financial Services Office, including nine years
8 as the chief financial officer. In June 1986, I was appointed to the position of
9 Commission Secretary, which encompassed the duties of chief operating officer and
10 administrative manager.

11 In September 1993, I became the Transportation Division Director, where I
12 stayed until my official retirement in 2002. Since 2002, I have worked part-time at
13 the Commission as a policy specialist, focusing my efforts primarily in the Safety and
14 Consumer Protection Division.

15

16 **Q. You were the Transportation Division Director for nine years. What were your
17 duties in that position as they apply to railroad safety?**

18 A. One of my direct reports was the Assistant Director for Railroad Safety. I was
19 responsible for overall management of the program. This included setting new
20 policies and reviewing and revising existing policies to ensure we were operating a
21 program that provided the safest environment possible for the railroads and the
22 general public.

23

1 **Q. You have worked part-time at the Commission since 2002 in the Safety and**
2 **Consumer Protection Division. How do your duties in the past five years relate**
3 **to railroad safety?**

4 A. My work in railroad safety involves a mix of field work and policy work. In
5 partnership with our crossing safety specialist and safety inspectors in various
6 disciplines, I conduct field visits of existing and potential crossing locations, high
7 pedestrian traffic areas, and any other area that may affect the safety of the railroad or
8 the general public. I review the conditions at the area and make recommendations for
9 changes to improve safety. My policy work includes policy development and
10 analysis at the direction of the Director of Safety and Consumer Protection and the
11 Assistant Director for Transportation Safety. Policy development generally involves
12 research, analysis and writing of existing or potential state law, Commission rules or
13 orders, or other materials that help govern how we regulate railroad and motor carrier
14 safety.

15
16 **Q. What is the purpose of your testimony?**

17 A. The purpose of my testimony is to provide an overview of Staff's policy position in
18 this case.

19 I will explain why Staff believes that BNSF has a responsibility to put in place
20 reasonable measures to reduce the danger that its addition of a second set of tracks at
21 Hickox Road would create. Staff believes this obligation on the part of the railroads
22 should be assumed in the Commission's balancing of the asserted public safety gains
23 of closing the crossing versus the asserted public convenience and necessity losses.

1 I will then explain why Staff believes that the safety gains that BNSF and
2 WSDOT advance in support of closing Hickox Road may be illusory given the
3 questionable safety of the alternative crossings to which current users of the Hickox
4 Road crossing would be diverted.

5 Staff anticipates that it will be able to recommend in its post-hearing brief
6 how the Commission should resolve the proponents' public safety arguments for
7 closing the crossing against the opponents' public convenience and necessity
8 arguments for keeping the crossing open.

9

10 **Q. Why doesn't Staff take a position in testimony regarding how the Commission**
11 **should resolve the ultimate question of whether the public safety requires the**
12 **closure?**

13 A. Staff expects that the parties that oppose the closure will offer testimony to try to
14 prove that the Hickox Road crossing is so important to the surrounding community
15 that it justifies any danger that might be avoided by closing the crossing. We
16 anticipate that this will raise questions about such matters as flood-fighting and flood
17 evacuation, which are outside of Staff's expertise. The Commission will have to
18 decide what weight to give those considerations based on the expert testimony of
19 witnesses sponsored by other parties. Staff will be in a better position to recommend
20 how to apply the legal standard (public safety requires the closure) to the facts once
21 the factual record has been developed through direct and rebuttal testimony and cross-
22 examination.

23

1 **Q. What is your understanding of BNSF and WSDOT’s argument for closure of**
2 **Hickox Road crossing?**

3 A. BNSF and WSDOT make two main arguments for closure, both of which are focused
4 on the fact that BNSF (with funding from the State of Washington intended to
5 increase the number and speed of Amtrak passenger trains on this line) is going to
6 extend its siding track over Hickox Road.

7 The first I will call the “operational needs” argument. BNSF says that if
8 Hickox Road were to remain open, BNSF would have to break its trains to comply
9 with the Commission’s rule against blocking a crossing for more than 10 minutes “if
10 reasonably possible,”¹ and that would eliminate the operational efficiencies that are
11 the very purpose for lengthening the crossing. Therefore, the Commission must close
12 Hickox Road to facilitate the construction of the siding. Notwithstanding the
13 Commission’s statements in a prior case, the “operational needs” argument is not a
14 valid reason for closing a crossing under RCW 81.53. The question is whether “the
15 public safety requires the closure” and that has traditionally been decided by
16 weighing the safety gains of closing the crossing against the public convenience and
17 necessity losses.

¹ WAC 480-62-220.

Blockage of public grade crossings.

(1) Railroad companies must not block a grade crossing for more than ten consecutive minutes, if reasonably possible.

(2) A blocked grade crossing must be cleared immediately by the fastest available method, if the train movement will not violate rules issued by the Federal Railroad Administration, upon the request of law enforcement or other emergency services personnel, or when the engineer becomes aware that the crossing is being approached by a law enforcement or other emergency services vehicle with its emergency lights flashing or that such a vehicle is stopped with its emergency lights flashing at the crossing blocked by the train.

(3) A grade crossing is "blocked" if any part of a stopped train occupies the crossing or causes warning devices to be activated.

1 The second argument for closing Hickox Road crossing I will call the
2 “increased danger” argument. BNSF says that if the siding were constructed over
3 Hickox Road, the existence of two sets of tracks (the existing mainline and the new
4 siding) would make the crossing too dangerous to remain open. This “increased
5 danger” argument is more consistent with the “public safety requires the closure”
6 standard than is the “operational needs” argument I described above.

7

8 **Q. Please explain what you mean when you say that BNSF has a responsibility to**
9 **put in place reasonable measures to reduce the danger created by the addition of**
10 **a second set of tracks at Hickox Road.**

11 A. The “increased danger” argument requires the Commission to accept a hypothetical
12 set of facts; specifically, that BNSF has already extended its siding across Hickox
13 Road, but that the same two quadrant gates are in place and no other changes have
14 been made to protect the crossing. Essentially, BNSF asks the Commission to
15 assume that the Commission has already allowed the railroad to create a more
16 hazardous condition at Hickox Road by extending a siding track next to the mainline,
17 but without being required to bear any responsibility to minimize that new hazard by,
18 for example, installing four quadrant gates. The Commission should not make this
19 assumption.

20 I want to be clear that I am not arguing that the Commission has authority to
21 prevent BNSF and WSDOT from building a siding over Hickox Road. I am arguing,
22 however, that the Commission has authority to determine the conditions that exist at a
23 highway/railroad crossing and to apportion the cost of necessary safety measures at

1 the crossing to the party they benefit (or, put another way, to the party that caused the
2 danger that is being mitigated).

3 In Staff's view, the policy underlying much of RCW 81.53 is to place
4 responsibility on the railroad, when an expansion of its operations creates a hazard at
5 a grade crossing, to bear the cost of reducing or eliminating that hazard. When a new
6 railroad crosses an existing road, or when the railroad makes changes to an existing
7 crossing for its benefit (and that includes the benefit of other railroad users such as
8 Amtrak, which is partly funded by the State of Washington), the railroad is
9 responsible for the cost of building a grade separation or making other changes
10 necessary to reduce or eliminate the resulting danger. This policy is apparent from
11 RCW 81.53.100,² RCW 81.53.110,³ and RCW 81.53.271(1).⁴ Staff believes that this
12 responsibility precedes any question about the need or usefulness of the road which
13 only comes into play when there is a petition to close an existing crossing.

14 It would be inconsistent with the policies underlying RCW 81.53 to allow the
15 railroad to first create an additional hazard (by extending a new set of tracks across a
16 road), to assume no responsibility for minimizing that hazard (by, for example,

² Whenever, under the provisions of this chapter, new railroads are constructed across existing highways, or highway changes are made either for the purpose of avoiding grade crossings on such new railroads, or for the purpose of crossing at a safer and more accessible point than otherwise available, the entire expense of crossing above or below the grade of the existing highway, or changing the route thereof, for the purpose mentioned in this section, shall be paid by the railroad company.

³ Whenever, under the provisions of this chapter . . . and existing grade crossing is . . . changed (or the style or nature of construction of an existing crossing is changed), the entire expense of constructing a . . . safer grade crossing, or changing the nature and style of construction of an existing crossing . . . shall be apportioned by the commission between the railroad, municipality or county affected, or if the highway is a state road or parkway, between the railroad and the state, in such manner as justice may require, regard being had for all facts relating to the establishment, reason for, and construction of said improvement.

⁴ If the proposed installation [of signals or warning devices] is located at a new crossing requested by a railroad, then the entire cost shall be apportioned to the railroad.

1 installing more effective protective devices), and then use the unmitigated hazard as
2 the reason to petition for closure of the crossing.

3

4 **Q. How can the Commission make use of this observation?**

5 A. When the Commission weighs the public convenience and necessity arguments
6 against the danger of retaining a hypothetical Hickox Road crossing with both a
7 mainline and a siding track running through it, the Commission should include in that
8 hypothetical the assumption that the railroad would have been responsible to put in
9 place some type of protection to reduce (though perhaps not eliminate) the increased
10 dangers resulting from a double crossing. Tom Zeinz explains why four quadrant
11 gates appear to be the only realistic means of addressing the increased hazard of two
12 sets of tracks, short of grade separation or closure.

13 The Commission should also assume that, if the length of the train in the
14 siding is so long that it cannot be positioned to avoid blocking Hickox Road without
15 breaking the train, Staff would not consider it necessary for BNSF to break its train in
16 order to comply with the Commission's blocking rule, WAC 480-62-220. That rule
17 says that "Railroad companies must not block a grade crossing for more than ten
18 consecutive minutes, if reasonably possible." Staff believes that when a train that is
19 being held in the siding is too long to pull clear of Hickox Road, it will not be
20 "reasonably possible" for the railroad to avoid blocking Hickox Road for longer than
21 10 minutes, and in fact, breaking the train could cause the crossing to be blocked for
22 longer than if the railroad did not break the train. This is further explained in Tom
23 Zeinz's testimony. Although Staff gives its assurance here that it would not seek

1 penalties for a violation of WAC 480-62-220 under the circumstances described, if
2 BNSF does not consider Staff's assurance to be adequate, BNSF can seek an
3 exemption from the rule from the Commission. (WAC 480-62-140 allows for
4 exemptions to any rule in chapter 480-62 WAC.) Thus, while the Commission
5 should assume the existence of four quadrant gates, it should also assume that the
6 convenience and usefulness of the crossing would be diminished by frequent and
7 lengthy blocking.

8 Finally, if the opponents of the closure of Hickox Road make their case that
9 the public convenience and necessity outweigh the danger of retaining the crossing,
10 then the Commission should require that BNSF install four quadrant gates, for all of
11 the reasons outlined in Tom Zeinz's testimony.

12

13 **Q. Please explain why Staff believes that the safety gains that BNSF and WSDOT**
14 **advance in support of closing Hickox Road may be illusory.**

15 A. It is sometimes said that public policy favors closure of at-grade crossings because
16 they are inherently dangerous. While this may be a worthy goal on a statewide or
17 nationwide level, it is not necessarily the case that closure of a particular crossing will
18 result in less likelihood of conflict between trains and motor vehicles. In an
19 individual case, it is necessary to consider where people who use the crossing would
20 be diverted if the particular crossing were closed. If they would be diverted to an
21 alternative route across the tracks that has a higher level of protection than the
22 crossing that is to be closed (*e.g.*, grade separation or a more ideal at-grade crossing),
23 then it is likely that closure would result in a net safety gain. But if the alternative

1 route across the tracks is another at-grade crossing that is the same or less ideal from
2 a safety standpoint than the crossing that is proposed to be closed, then it is less likely
3 that closure will result in a net safety gain.

4 Thus, the Commission must consider whether there really would be any net
5 safety gain from the proposed closure before it weighs that safety gain against alleged
6 losses to the public convenience and necessity. These losses may include the public
7 safety losses alleged by emergency responders who assert that their objectives are
8 best served by numerous routes across the tracks. (For analytical clarity, Staff would
9 categorize the emergency response considerations as falling on the “public
10 convenience and necessity” side of the balancing test. That is not to denigrate these
11 considerations, but just to clarify that they are to be weighed against any net reduction
12 in conflict between trains and motor vehicles that results from closing a crossing.)

13 As I mentioned at the beginning of my testimony, it appears that BNSF and
14 WSDOT witnesses overlook the fact that traffic that is diverted from Hickox Road
15 would be diverted to crossings that are not necessarily safer, and may be less safe
16 than Hickox Road (especially if the Commission assumes that Hickox Road would be
17 equipped with four quadrant gates). Because of this, it does not logically follow that
18 there will be a net reduction in conflict between trains and motor vehicles as a result
19 of the closure of the Hickox Road crossing, *unless* the Stackpole Road crossing is
20 improved, as proposed in BNSF’s petition, and additional improvements are also
21 made (as suggested by Tom Zeinz) at the Blackburn Road crossing.

1 Bob Johnston and Tom Zeinz explain the safety problems that exist at the
2 Blackburn and Stackpole crossings, the two crossings to which the Hickox crossing
3 traffic would be diverted (according to the WSDOT-sponsored traffic study).

4

5 **Q. Does this conclude your testimony?**

6 **A. Yes, it does.**