

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,

Petitioner

v.

YAKIMA COUNTY,

Respondent

YAKAMA NATION,

Intervenor.

DOCKET NO.: TR-140382

AND

DOCKET NO.: TR-140383

POST-HEARING BRIEF

POST-HEARING BRIEF ON BEHALF OF INTERVENOR YAKAMA NATION

June 1, 2015

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## I. INTRODUCTION

1 BNSF Railway Company (“Petitioner”) has failed to satisfy its burden on its petitions (hereafter “Petitions”) for the closures of two highway-rail grade crossings consolidated in the instant matter before the Washington Utilities and Transportation Commission (the “Commission”). Aside from speculative evidence attempting to impute nationally collected data regarding general risks of railroad crossings on the specific crossings at issue here, and Petitioner’s misplaced reliance on a general policy and proclivity for closing grade crossings, the Petitioner has not shown that either the grade crossing at Barnhart Road (“Barnhart Road Crossing”) or the grade crossing at North Stevens Road (“North Stevens Road Crossing”, collectively “the Crossings”) are particularly dangerous. Indeed, there is no evidence in the record establishing that either of the Crossings have caused any individual any harm at any point since these crossings were first established. In fact, to the extent the Commission accepts the evidence Petitioner’s experts offer that the Crossings are “inherently dangerous,” Respondent Yakima County (“Respondent” or the “County”) and Intervenor Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”), a federally recognized sovereign Indian nation, have both offered evidence into the record showing that most if not all risk averted by the closure of the Crossings would simply be passed along to alternate crossings. In other words, if the Crossings are closed, former users of the Crossings will generally need to cross the railroad elsewhere at “inherently dangerous” alternate crossings. Moreover, the evidence Petitioner advanced on the purported risks or dangers associated with the Crossings failed to account for—or adequately analyze—the increase in risk to the public on nearby roads caused by the diversion of traffic, especially slow-moving farm equipment, that would result if the Crossings were closed, in addition to the community’s need for the Crossings and the convenience and economic benefit the community derives from the Crossings.

2 On the other hand, the Yakama Nation, the Yakima County government, the community groups and the vast majority of the individuals who will be impacted by Petitioner’s proposed closures and offered comments for the record all objected to the closure of either of the

Crossings on the basis of public convenience and necessity. In fact, Petitioner could offer evidence of only one member of the community who would like to see the Crossings closed based largely on that witness's recollection of hearsay accounts regarding accidents that occurred decades ago, none of which occurred at the Crossings at issue here. No other members of the community spoke at the public hearing in favor of Petitioner's plans to close the Crossings. If the Crossings were truly the ominous hazard Petitioner claims, one would think the Petitioner could have managed to find more than one individual in the community who agrees with Petitioner and would like to see the Crossings closed.

3 The Yakama Nation brings a unique perspective to this matter given the cultural importance of the Barnhart Road Crossing to the Elders and community of the Satus Longhouse Community. Although the Petitioner established that the use of alternative crossings for funeral processions between the Satus Longhouse and the nearby Tribal cemetery across the railroad tracks would largely keep the procession off of the state highway, the testimony in the record from two Longhouse Elders establishes that the traditional route for Tribal members who use the nearby cemetery utilizes the Barnhart Road Crossing, and its closure would adversely impact the Longhouse community and its traditional and religious practices.

4 In short, although closure of grade railroad crossings may be favored as a matter of policy, there is no law, regulation, or policy Petitioner can cite holding that such closures should be granted whenever requested and without respect to the community impacts of those closures. More importantly, anecdotal and speculative evidence aside, there is nothing in the record establishing that the two specific Crossings that are the subject of the matter in dispute are inherently dangerous. Put simply, Petitioner has failed to satisfy its burden, and the parties opposing the closure of the Crossings have advanced significant evidence showing that the balance in this matter weighs heavily against closure of the Crossings.

## II. LEGAL STANDARD

5           The Commission is authorized to hear petitions from road authorities or railroads for “the closing and discontinuance of an existing highway<sup>1</sup> crossing, and the diversion of travel thereon to another highway or crossing.”<sup>2</sup> The Commission may grant such a petition when the Commission finds that doing so is required by “the public safety.”<sup>3</sup>

6           Petitioner bears the burden of establishing, by a preponderance of the evidence, that closure of a grade crossing is required by the public safety.<sup>4</sup> Furthermore, even if Petitioner meets its burden, the petition to close the grade crossing may be denied where “the need for the crossing is so great that it must be kept open notwithstanding its dangerous condition.”<sup>5</sup> In determining whether the public need for the crossing outweighs the hazards it poses, the Commission has evaluated a series of factors, including (a) the amount and character of travel on the railroad and on the highway, (b) the number of people affected by the closure, (c) whether there are readily available alternate crossings in close proximity that can handle any additional traffic resulting from the closure, and (d) whether the alternative crossings are safer than the crossing proposed for closure.<sup>6</sup>

7           Washington law stipulates that any future railroad crossings “shall cross existing railroads and highways by passing either over or under the same, *when practicable*, and shall in no instance cross any railroad or highway at grade *without authority first being obtained from*

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<sup>1</sup> “Highway” is defined in RCW 81.53.010 to include “all state and county roads, streets, alleys, avenues, boulevards, parkways and other public places actually open and in use, or to be opened and used, for travel by the public.”

<sup>2</sup> RCW 81.53.060.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* See also *BNSF Railway Co. v. City of Mount Vernon*, TR-070696 (June 25, 2008).

<sup>5</sup> *Id.*

<sup>6</sup> See *BNSF v. City of Ferndale*, TR-940330 (March 31, 1995); *BNSF v. Skagit County*, TR-940282 (December 13, 1996); and *Union Pacific Railroad v. Spokane County*, TR-950177 (July 3, 1996).

*the commission to do so.*<sup>7</sup> Thus, although Washington law does not favor new railroad crossings at grade, and the inherent danger of such crossings has been acknowledged in decisions by the Commission and state courts, the law does, in fact, contemplate new crossings at grade when it would be impracticable for the crossing to pass over or under the other railroad or highway.<sup>8</sup> Moreover, the law vests the Commission with the authority to approve new railroad crossings at grade.<sup>9</sup> Along the same lines, there is no law requiring the closure of railroad crossings at grade when a railroad petitions for such a closure.

8 As discussed in detail below, Petitioner's claims hinge on the notion that grade railroad crossings are inherently dangerous.<sup>10</sup> That factual claim may be easily established when analyzing grade crossings in a vacuum to the exclusion of other issues that are involved in the closing or opening of a grade crossing. But this narrow statistical analysis regarding the relative risks of any grade railroad crossing has not given rise to statutory or regulatory authority compelling the Commission to close any grade crossing when an authorized party petitions for the closure. In fact, the statute governing the opening of new railroad crossings requires the Commission to undertake a broad analysis to consider the entirety of the circumstances at issue when it must determine whether separating grades for a crossing is practicable, including "the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country, *and all other circumstances and conditions naturally involved in such an inquiry.*"<sup>11</sup>

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<sup>7</sup> RCW 81.53.020 (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> It is noteworthy that during questioning by the Administrative Law Judge, she noted that Petitioner has actually agreed to open three new at-grade crossings on its line since 2010. Norris, TR. 299:25 – 300:3.

<sup>11</sup> RCW 81.53.020 (emphasis added).

9 By analogy, the Commission should engage in the same broad all-encompassing inquiry in the instant case regarding a petition to close long-existing railroad Crossings. The statutorily prescribed analysis of the “circumstances and conditions naturally involved” in the instant case should include analyzing not only the risks associated with the Crossings themselves, but also the corresponding risks that arise if the Crossings are closed, including the diversion of traffic, the risks associated with the alternative crossings, and the convenience, necessity, and economic importance of the crossings proposed for closure. Applying this authority and the prescribed analyses to the facts at issue and the evidence in the record reveals that Petitioner has failed to meet its burden, and that even if the Commission finds it met its burden, the need for these crossings is so great, and the corresponding risks that arise in the event that the grade crossings proposed for closure here are closed, that the public interest and safety ultimately lies with keeping these crossings open.

### III. SUMMARY OF FACTS

#### A. The Barnhart Road Crossing

10 The Barnhart Road Crossing is located on the Yakama Nation Reservation, and is situated on tribal land held in trust for the benefit of the Yakama Nation by the United States of America.<sup>12</sup> The railroad crossing at Barnhart Road is controlled with stop signs and “crossbuck” signs.<sup>13</sup> The Barnhart Road Crossing is situated just to the north of Washington State Route 22 (“SR 22”).<sup>14</sup> The roadway at the Barnhart Road Crossing is paved between the crossing and SR-22, and crosses the tracks at a near 90-degree angle.<sup>15</sup> North of the crossing the roadway is gravel and curves slightly before the intersection at Drainbank Road approximately 900 feet north of the railroad crossing.<sup>16</sup> Barnhart Road has an un-posted speed

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<sup>12</sup> See TR-140383, Petition for the Closure of a Highway-Rail Grade Crossing - USDOT Crossing No. 104526P - Barnhart - Railroad MP 62.40, p. 5.

<sup>13</sup> Exh. No. KM-1T McHenry, 2:22 - 3:6.

<sup>14</sup> Exh. No. AAP-2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*



limit, indicating that “basic speed law applies” according to Yakima County witness and Transportation Engineering Manager for Yakima County Public Services, Kent McHenry.<sup>17</sup> Importantly, the record reflects that the railroad track is level to the east and west of the crossing and there “are no trees, hills, buildings or other structures that limit visibility in either direction.”<sup>18</sup>

11 The Satus Longhouse, a place of worship for tribal members and guests, is situated roughly 1.7 miles from the SR 22 turnoff at the Barnhart Road Crossing, and approximately 3.2 miles from the SR 22 turnoff at the closest railroad crossing to the North, at Indian Church Road.<sup>19</sup> If the Barnhart Road Crossing closed, the travel distance for those going to the Satus Longhouse would increase at least three tenths of a mile, assuming visitors and members to the longhouse were traveling from the north to the south on SR 22 (where the majority of the population on the Yakama Reservation resides) and used the railroad crossing at Indian Church Road and SR 22.<sup>20</sup> The alternate route utilizing the crossing at Indian Church Road to Barnhart Road, however, would require more time on a windy rural road, and includes a sharp turn that would be difficult if not impossible for larger vehicles to make without stopping and taking the extra time to utilize a multi-point turn.<sup>21</sup> Other alternative routes to access the Satus Longhouse from SR 22 are longer by at least 1.3 miles.<sup>22</sup> According to the testimony of Satus Longhouse Elders and natives to the area, Johnson Meninick and Roy Dick, the Barnhart Crossing is the route traditionally used by Satus Longhouse members and visitors to access a nearby tribal cemetery, and is the general route used to access the Longhouse by members of the Longhouse and visitors.<sup>23</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, citing photographs appended to Mr. McHenry’s testimony at Exhibit A (KM-2).

<sup>19</sup> Exh. No. AAP-5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, see also Exh. No. AAP-1T Pinkham, 3:17 – 6:21.

<sup>22</sup> *Id.*

<sup>23</sup> See generally Exh. No. RD-1T, Exh. No. JM-1T.

12 There are several home sites whose residents also utilize the Barnhart Crossing for ingress and egress to their properties from SR 22.<sup>24</sup> The longer time it would take to travel the additional distance on rural and windy roads to access alternate railroad crossings would inconvenience these residents, along with those who worship and otherwise attend the Satus Longhouse. More importantly, however, the additional time and possible complications a large emergency response vehicle may have navigating sharp turns—such as the sharp turn from Indian Church Road to Barnhart Road—could prove dangerous to life and property, and possibly fatal to members of the community whose properties are most easily and quickly accessed from SR 22 by use of the Barnhart Road Crossing.<sup>25</sup>

### **B. The Stevens Road Crossing**

13 The North Stevens Road Crossing is controlled by stop signs and crossbuck signs.<sup>26</sup> The road at this grade crossing is gravel and, like the Barnhart Road Crossing, crosses the railroad tracks at a nearly 90 degree angle.<sup>27</sup> Also like the Barnhart Road Crossing, there is no posted speed limit at North Stevens Road near the railroad track crossing.<sup>28</sup> And again, the North Stevens Crossing has no features like trees, hills, buildings, or other structures that limit visibility in either direction, according to the testimony of Mr. McHenry.<sup>29</sup> Based on the evidence in the record, it appears that the North Stevens Road Crossing is principally used by those working in the agriculture industry.<sup>30</sup> The testimony from these farmers and other agricultural workers establishes that businesses will suffer and slow-moving farm equipment will spend more time traveling along SR 22 to reach alternate routes if the North Stevens Road Crossing and the Barnhart Road Crossing are closed. The speed limit on SR 22 is 60 miles per hour.

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<sup>24</sup> Exh. No. AAP-1T Pinkham, 3:17-4:10.

<sup>25</sup> *Id.*

<sup>26</sup> Exh. No. KM-1T McHenry, 3:8-18.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, citing Exhibit B to the Testimony of Kent McHenry.

<sup>30</sup> See Exh. No. AC-1T, Exh. No. EB-1T, Exh. No. CP-1T, Exh. No. PS-1T, Exh. No. DT-1T, Lyall, TR. 316:13 – 319:3.

### C. Community and Government Positions

14 Aside from lay witness Ken Bearchief, who neither works nor lives in close proximity to either of the two Crossings, the comments from the community show a uniform opposition to closing the Crossings based not only on convenience, and necessity, but upon the additional hazards that will consequently arise from the closure of the two Crossings. Even the Washington State Department of Transportation has weighed in and, in a March 12, 2015 letter from the Region Administrator for Planning and Program Management to Kent McHenry, notes that the closure of the crossings would increase danger to the community and those who use SR 22:

[i]f the N. Stevens Road and Barnhart Road crossings are closed, there are no alternate routes on the local system to accommodate the farm vehicle travel. In the absence of alternative routes, WSDOT expects an increase in the number and trip duration of farm vehicles on SR 22. . . . SR 22 has a speed limit of 60 miles per hour. Introducing slower farm vehicles with the high speed highway traffic of SR 22 will create operational concerns and would likely increase the risk of collisions.<sup>31</sup>

As a matter of fact, no government agency with jurisdiction or interest in this area supports Petitioner's position.

## IV. ARGUMENT

### A. Petitioner has failed to meet its burden so its petitions to close the Barnhart Road Crossing and the North Stevens Road Crossing should be denied.

15 Boiled down to its essence, Petitioner's case is that because there are inherent risks associated with railroad crossings at grade, closure of such crossings should always be considered to be "required by the public safety." One can see this manifested in the following testimony of Petitioner's expert, Gary Norris:

the potential for a crash at these [crossings] is not worth allowing these crossings to remain open because the benefit or the public necessity for circulation does not overwhelm or override the potential for an incident occurring at these crossings. And I think in light of our statewide policy to eliminate at-grade crossings and eliminate traffic fatalities on our state highways, this is a pretty easy decision to make, in my mind, to eliminate another area of risk that is unnecessary.<sup>32</sup>

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<sup>31</sup> Exh. No. KM-10.

<sup>32</sup> Norris, TR. 296:5-15.

16 Put another way, the principal consideration underpinning Petitioner's expert opinion is what Mr. Norris sees as a "potential for a crash" (i.e., "inherent danger") at the Crossings weighed against the "public necessity for circulation." The Petitioner did not seem to seriously analyze the increased risk created by diverting traffic—especially slow-moving farm equipment—from the Crossings to other nearby crossings in the area. In fact, Petitioner's expert witness baldly admitted as much:

Q. Did you analyze at all the increased risk of collisions along State Route 22 caused by diverting passenger vehicles and farm equipment onto State Route 22?

A. No.<sup>33</sup>

Nor did Mr. Norris, nor any other of Petitioner's witnesses, appear to account for the negative economic impacts of closing these Crossings. Another of Petitioner's expert witness, Mr. Foster Peterson, also testified that not only did he not consider the potential adverse impacts that might result from closing the Crossings, he was not even asked to consider those impacts in performing his analysis for Petitioner:

Q. So did you do any analysis as to the sort of adverse impacts of closing these crossings?

A. I would say in terms of, I mean, maybe if I can ask for clarification, adverse impacts in terms of?

Q. Public safety. And if you didn't, that's fine.

A. Well, the way I would characterize it is I did not, given that I was primarily focused on the benefits of public safety to closing these crossings in particular compared to the alternate routes.

Q. Your focus was the crossings themselves; is that correct?

A. I would say the crossings themselves and then the relative interaction of trains and motor vehicles of varying types at grade crossings.

Q. At grade crossings?

A. Correct.

Q. So you wouldn't have looked at, you know, the knock-on effects of crossing those crossings on adjacent county infrastructure; is that correct?

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<sup>33</sup> *Id.* 282:4-7.

A. Correct. I wasn't asked to, either.

Q. So you don't have an opinion on what, I guess, a negative safety aspect might be of closing these crossings?

A. I really don't as I, again, wasn't asked to study it and I didn't.<sup>34</sup>

17 *Dept. of Transportation v. Snohomish County* reveals that the analysis Petitioner has undertaken to sustain its burden is deficient. In this decision, the Washington Supreme Court quoted extensively from the findings of fact developed by the Department of Transportation in the administrative proceedings concerning the petition at issue in that case, including findings reflecting a broad scope of inquiry by the administrative agency charged with deciding that matter:<sup>35</sup>

. . . the grade crossing of Park Avenue and the Great Northern Railway tracks in Mukilteo is an exceedingly dangerous crossing because of the following factors: the grade of Park Avenue south of the railway tracks which, particularly in icy or wet weather, could cause northbound motor vehicles to slide onto the tracks, or southbound vehicles to slide backwards onto the tracks, the poor visibility available to motorists approaching the tracks, the number of trains using the tracks, and the speed with which these trains travel over this crossing.<sup>36</sup>

This analysis performed by the Department of Transportation shows that the petitioner in that case did not just end its inquiry and the evidence it submitted with the notion that railroad crossings at grade are inherently dangerous and, therefore, closure should be a matter of *pro forma* decision-making by the relevant administrative agency. The agency, in fact, considered the factors identified above—rendering the crossing at issue in that case more dangerous than normal—against the community risks associated with closing the crossing and issues of convenience and necessity.<sup>37</sup> Given the extensive findings of fact, it is clear the petitioner in that case had established that a variety of factors such as the grade of the roads approaching the crossing, the propensity for ice on that grade and cars consequently slipping onto the tracks, poor visibility, and the number and speed of trains traveling at the crossing, outweighed not

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<sup>34</sup> Peterson, TR 202:11 – 203:10.

<sup>35</sup> *Dep't of Transportation v. County*, 35 Wn.2d 247, 251-56 (1949).

<sup>36</sup> *Id.* at 253-54.

<sup>37</sup> *Id.* at 252-56.

only the convenience and necessity of keeping the crossing open, but also the risks associated with closing the crossing.<sup>38</sup>

18 By contrast, the testimony in the record in the instant case reveals a total failure by Petitioner to consider the specific and particular risks associated with closing the Crossings. This reflects Petitioner's attitude that there is effectively no real burden for any petitioner proposing to close a railroad crossing at grade because all such crossings are inherently dangerous, and, aside from cursory public necessity or traffic capacity considerations, the inquiry should go no further. In other words, Petitioner appears to advance the notion that the inherent danger of railroad crossings at grade creates a conclusive as opposed a rebuttable presumption.<sup>39</sup> The Petitioner's contention, however, is unsupported by any legislative or common law authority, much less common sense.

19 Perhaps Petitioner wishes to avoid an in-depth analysis because that analysis shows that closure of the two Crossings at issue here is not "required by the public necessity," and that, balancing the relevant factors, the body of evidence in the record weighs against the Petitions. Yakama Nation does not dispute the general contention that there are inherent risks with railroad crossings at grade, just as there are inherent risks with the existence of a highway or any road intersection of any sort. Instead, the question here is whether the risks associated with a railroad crossing at grade are outweighed by the public risks that would be exacerbated if the crossing were closed. Here, the evidence shows that this question must be answered in the affirmative, and, therefore, the closure of the two Crossings is not required by the public necessity.

20 Yakama Nation's expert witness, who has worked with the Yakama Nation Reservation roads and traffic for more than three decades, has opined that if the Commission grants

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<sup>38</sup> *Id.* at 254-55 (analyzing whether fire trucks would be hampered in providing emergency services in the event the crossing at issue in the case was closed).

<sup>39</sup> *City of Sprague v. Washington Utilities & Transportation Commission, et al.*, No. 03-2-00009-5 (Lincoln Co. Sup. Ct. 2005) ("...the WUTC treated the rebuttable presumption that railroad crossings are inherently dangerous as a conclusive presumption").

Petitioner's requests to close the Crossings, the risk of collision, injury, and fatalities will actually increase:

. . . people who use these crossings that BNSF wants to close will very likely still need to cross the railroad at other railroad crossings to access their residences, farms, or places of business. So any reduction in traffic crossing the railroad crossing is likely negligible if not totally nullified. In essence, the closure will just divert traffic from one crossing to another crossing. And even if the other crossings may be safer, which is unlikely, the vehicles that would normally use the Barnhart Road or N. Stevens Road crossings are now increasing their travel times and distances, which increases the chances that they may get in an accident elsewhere. Second, the areas surrounding these railroad crossings are largely used for farming. Those farmers who would normally use the crossings at Barnhart Road or N. Stevens Road will now likely need to operate their farm equipment at longer distances along State Route 22 and other roads. The operation of farm equipment on roads where vehicles travel at high rates of speeds and cross over into the oncoming lane of traffic to pass farm equipment logically increases the risk of accidents. The closures of these crossings will result in more farm equipment traffic on these roads, and therefore increase the risk of accidents on the Yakama Reservation.<sup>40</sup>

Moreover, Mr. Pinkham noted that emergency response time to the residents and visitors who presently utilize the Barnhart Road Crossing for ingress and egress to their residences, places of work and worship, will be increased, thereby further aggravating the risk to the public safety if the Commission grants the Petitioner's request to close the Crossings.<sup>41</sup> Respondent Yakima County's expert witness, Mr. McHenry, has similarly opined that: (1) there is no evidence that closing the Crossings would result in fewer crossings of the railroad tracks in this area at other crossing points, at least one of which is more dangerous in Mr. McHenry's opinion; (2) because the closures of the Crossings would simply divert traffic to other crossings, any safety benefit associated with closing the Crossings is negated; and (3) there are aggravating factors associated with closing the Crossings increasing the risk to the public safety.<sup>42</sup>

21 But the two parties opposing the petitions in this case are not the only governments who have raised objections regarding the request to close the Crossings. The letter from Washington State's Department of Transportation Assistant Region Administrator for Planning and Program Management, Troy A. Suing, P.E., shows that at least one Washington State

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<sup>40</sup> Exh. No. AAP-1T, Pinkham 3:22 – 4:10.

<sup>41</sup> *Id.*, Pinkham 4:11 – 6:21.

<sup>42</sup> Exh. No. KM-1T, McHenry 6:3 – 10:7.

agency shares the community's objections to closing the Crossings. This state agency echoes the concerns of the Yakama Nation and Yakima County, noting that "[i]f the N. Stevens Road and Barnhart Road crossings are closed . . . WSDOT expects an increase in the number and trip duration of farm vehicles on SR 22 . . ." and, consequently, "[i]ntroducing slower farm vehicles with the high speed highway traffic of SR 22 will create operational concerns and would likely increase the risk of collisions."<sup>43</sup>

22           Petitioner has simply not met its burden. Its evidence relies on statistics concerning grade railroad crossings generally, but Petitioner did not specifically identify and substantiate additional factors that make the Crossings at issue here especially dangerous. And, moreover, during the evidentiary hearings on this matter, it was shown that the Petitioner's own expert had exaggerated in his testimony and did not know the statistics regarding the fatality rate in collisions involving motor vehicles and trains:

Q. And then line 18 on page 8 you talk about the number -- or the impact of a train-vehicle collision is catastrophic generally resulting in fatalities. Have you reviewed statistical data about grade crossing accidents to determine the rate of fatalities?

A. No, I have not.

Q. Are you aware that commission records show 102 crossing accidents in the past five years with 14 of those resulting in a fatality?

A. No, not.

Q. So do you believe that a 14 percent fatality rate means that collisions generally result in a fatality? Yes or no.

A. Well, with those statistics, no.<sup>44</sup>

Similarly, Petitioner failed to identify and analyze the risks that will arise if the Crossings are closed. Considering the evidence in the recording showing the dangers and risks to the community that would be created or aggravated in the event the Crossings are closed,

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<sup>43</sup> Exh. No. KM-10.

<sup>44</sup> Norris, TR. 304:6-19.



Petitioner has not met its threshold burden to show that the public interest requires the Crossings to be closed.

**B. Even if the Commission determines that Petitioner has met its burden, the need for the Crossings is so great that they should be kept open.**

23 When a petitioner has met its burden, the Commission retains the authority to reject the petition to close a railroad crossing at grade when the need for the crossing is found to be so great that it the crossing should remain open notwithstanding its dangerous condition.<sup>45</sup> In this case, while it appears clear that Petitioner has failed to meet its burden, to the extent the Commission decides that it has, the evidence on the record shows a need that is so great that the Crossings should remain open. This need is based on (1) the testimony of Yakama Nation Tribal Elders that the Barnhart Road Crossing is part of a culturally significant and traditional route the Satus Longhouse community uses to access the longhouse and a tribal cemetery; (2) the agricultural industry's testimony indicating that the Crossings serve their economic interests and, thereby, the community's economy<sup>46</sup>; and (3) the safety hazards that the closure of the Crossings would create.

24 The testimony offered by Yakama Nation and Yakima County should be accorded significant weight in determining the interests of the community, and the need to keep the Crossings open. No other entity is better situated to attest to the need of the community to maintain these long-existing Crossings; certainly Petitioner is not situated to testify to, and did not adequately analyze, the community's interests and the community members' need for the Crossings at issue in the instant matter. Deferring to a community's position on closure of a railroad crossing is not unprecedented. In 2002, for example, an Administrative Law Judge for the Commission recommended a petition for closure of two crossings be denied based on numerous considerations, including, principally, the needs of the community.<sup>47</sup> The Commission rejected the Administrative Law Judge's recommendation, and the matter was

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<sup>45</sup> *BNSF Railway Co. v. City of Mount Vernon*, TR-070696 (June 25, 2008).

<sup>46</sup> As noted in *Burlington Northern Santa Fe v. City of Sprague*, the FHA's guidelines on closure of crossings calls for a "careful 'economic assessment of the positive and negative impacts of crossing closures.'" TR-010684 at p. 11 (October 21, 2002).

<sup>47</sup> *Id.*

appealed to the Lincoln County Superior Court.<sup>48</sup> Ultimately, on appeal, the court held that the Commission's rejection of the Administrative Law Judge's recommendation was premised on treating the "rebuttable presumption that all railroad crossings are inherently dangerous as a conclusive presumption," and upon the Commission's disregard of significant evidence showing the community's need for the crossings at issue in that case.<sup>49</sup> In the instant matter, the community has rebutted the presumption regarding the inherent danger of railroad crossings at grade by highlighting the corresponding dangers and risks to the community that arise if the Crossings are closed. The community has further demonstrated an economic, cultural, and safety need for the Crossings to remain open, and a demonstrated convenience interest in maintaining the Crossings, all of which establish that Petitioner's requests to close the Crossings should be denied.

## V. CONCLUSION

25 Petitioner's claim that closure of the Crossings is required by public necessity can only be supported if one analyzes the Crossings at issue in a vacuum, to the exclusion of the myriad issues that will consequently arise in the event the Crossings are closed. Of course, closing the Crossings would eliminate a potential for vehicle-train collisions at the Crossings. But the vehicles that normally use the Crossings will now have to travel farther distances to other railroad crossings, and the issues that simple fact raises were largely ignored by Petitioner. Yakama Nation, Yakima County, and the Washington Department of Transportation, on the other hand, have looked at the big picture.

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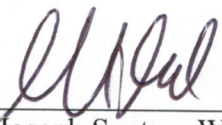
<sup>48</sup> *City of Sprague v. Washington Utilities & Transportation Commission, et al.*, No. 03-2-00009-5 (Lincoln Co. Sup. Ct. 2005)

<sup>49</sup> *Id.* at pp. 4-5.

And the evidence in the record establishes that Petitioner has not proven by a preponderance of the evidence that closing the Crossings is required by public necessity, nor has Petitioner shown why public necessity, convenience, and overall safety on the state and local road system in this area does not require that the Crossings remain open.

DATED this 1<sup>st</sup> day of June, 2015

Galanda Broadman, PLLC

 #30331  
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R. Joseph Sexton, WSBA #38063  
Galanda Broadman PLLC  
Attorneys for Intervenor Yakama Nation  
8606 35<sup>th</sup> Ave NE, Suite L1  
P.O. Box 15146  
Seattle, WA 98115  
(206) 557-7509

**CERTIFICATE OF SERVICE**

I, Molly A. Jones, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled matter, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35<sup>th</sup> Ave. NE, Suite L1, Seattle, WA 98115.

3. I submitted the foregoing document for filing with the Washington Utilities and Transportation Commission via United States Postal Service or a courier service for hand delivery to Steven King, Executive Director and Secretary of the Washington Utilities and Transportation Commission, and through the Commission's Web Portal. I also submitted an electronic PDF version as well as hard copies via United States Postal Service to the following parties and representatives:

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<p>Counsel for Petitioner, BNSF Railway  Tom Montgomery  Montgomery Scarp MacDougall, PLLC  1218 Third Avenue, Ste 2700  Seattle, WA 98101</p>	<p>Representative for Petitioner, BNSF Railway  Richard Wagner  Manager Public Projects  BNSF Railway  2454 Occidental Avenue S.  Suite 2D  Seattle, WA 98134</p>
<p>Counsel for Respondent, Yakima County  Kenneth W. Harper  Menke Jackson Beyer, LLP  807 North 39th Avenue  Yakima, WA 98902</p>	<p>Representative for Respondent, Yakima County  Gary Ekstedt  Yakima County  Dept of Public Services  County Engineer / Assistant Director  128 N. 2<sup>nd</sup> Street, Room 408 (Courthouse)  Yakima, WA 98901-2639</p>

The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Yakima, Washington, this 1<sup>st</sup> day of June, 2015.

