BEFORE THE WASHINGTON STATE

UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY, a Delaware Corporation, Petitioner vs. CITY OF MOUNT VERNON Respondents, SKAGIT COUNTY, WSDOT, and WEST VALLEY FARMS, LLC, Intervenors.	)	DOCKET NO: TR-070696

PETITIONER BNSF RAILWAY COMPANY'S POST-HEARING BRIEF

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I. INTRODUCTION

1. The petition by BNSF Railway Company ("BNSF") to close the at-grade railroad crossing at Hickox Road along the southern boundary of the City of Mt. Vernon impacts only a sparsely populated flood plain west of the railroad tracks and east of the Skagit River. The area is almost entirely farmland. The parties opposing the closure have raised the expected arguments that support their local interests: namely, that closing the crossing will impact public convenience, in this case by requiring additional travel to utilize either of the alternative routes at Stackpole Road to the south, or Blackburn Road to the north.

2. The opposing parties have also sought to characterize this inconvenience in terms of an adverse impact to public safety, specifically with regard to emergency response by the Rural Fire District and flood fighting and evacuation efforts in the event of a 50-year or 100-year flood event. However, as set forth more fully herein, the effort to characterize the inconvenience as an adverse public safety issue does not withstand scrutiny. This is especially true with the flood fighting and evacuation concerns that are naturally and reasonably foremost in the minds of people who farm and live in a flood plain, but which can be resolved with something as simple as a locked gate. Petitioners have proposed a gate that can be opened by public authorities for emergency services in the event of flood fighting, flood evacuation, or a major structural fire.

3. The law is clear that the WUTC should grant a petition to close an at-grade crossing if it finds that public safety (i.e., the cumulative danger of keeping the crossing open) outweighs public convenience and necessity. Here, the fundamental danger is that Hickox Road will soon bisect an extended siding track designed to accommodate extremely long (8,000 to 9,000 foot) freight trains so that other passenger and freight trains can safely meet and pass at that location. The siding project has broad significance to the overall operation of the railroad's Northwest Division and will further assist in removing freight cargo from increasingly congested interstate

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highways. The project specifically enables WSDOT to provide more frequent and reliable passenger rail service for Mount Vernon citizens and regional commuters traveling between Portland, Oregon and Vancouver, British Columbia. The siding track is designed to have long trains stopped there for extended periods, effectively closing the crossing for hours at a time, possibly longer, which would create confusing and dangerous traffic conditions if the crossing is not closed.

4. Frequent interference with vehicle traffic by stopped trains and switching movements; the profound danger presented by shorter trains stopped near the crossing, but not blocking it (causing drivers to mistakenly believe that signal lights and gates are activated by the stopped train and not a high-speed passenger train approaching on the other track); and the well-documented dangers posed by frustrated or impatient drivers who evade, bypass or ignore the crossing protection devices are all reasons why public safety requires the WUTC to grant the petition to close the Hickox Road crossing.

5. The opposing parties' stated concerns about safety completely fail to address the inescapable dangers created by this situation. Catastrophes involving a collision between a crowded passenger train and a commercial truck or farm vehicle do not occur frequently, which is fortunate, however, fatal collisions involving passenger vehicles and trains are not so uncommon. Regardless of whether such fatalities are caused by a driver misjudging the speed and distance of an approaching train, being unaware that a visible train is stopped to allow a second train to pass, or merely ignoring the warning devices due to impatience, the devastating consequence is that a train hitting a car has the same impact as a car crushing a can of soda.

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II. ANALYSIS: THE CROSSING SHOULD BE CLOSED

A. The Relevant Decision-making Authority Following A Hearing To Close An At-grade Crossing.

6. Chapter 81.53 of the Revised Code of Washington grants the Washington Utilities and Transportation Commission ("WUTC" or "Commission") the authority to regulate the safety of railroad grade crossings. The "legislature finds that grade crossing, rail trespass, and other safety issues continue to present a public safety problem."[1] RCW 81.53.020 states the legislature's preference for overcrossings and undercrossings where practicable, and prohibits the construction of a crossing at grade without prior Commission approval. When an at-grade railroad crossing becomes too dangerous to keep open to public travel, a railroad company may file a petition with the Commission to close the crossing.[2] The WUTC holds a public hearing when a petition to close a crossing is opposed.[3] After a hearing is conducted before a WUTC administrative law judge, the judge is to issue an initial order which "resolve[s] contested issues on the basis of the official record in a proceeding."[4] The tribunal's authority depends on whether BNSF's petition is granted or denied.

1. Partial Grant Of The Petition And Conversion Of The Hickox Road Grade Crossing To A Gated Private Crossing For Emergency Use, Or Grant Of The Petition And Full Closure.

7. For a hearing on a petition to close a railroad crossing, RCW 81.53.070 states

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[1] *See* "Findings" of RCW 81.53.271.

[2] *See* RCW 81.53.060.

[3] *Id.*

[4] WAC 480-07-820. All initial orders are "subject to further action by the commission as provided in WAC 480-07-825" and become final orders of the commission unless the commission reviews the initial order."*See* WAC 480-07-825. If a party requests administrative review, the Commission "may by final order adopt, modify, or reject an initial order after considering the pleadings and the record. Alternatively, the commission may remand the matter for further proceedings with instructions to the presiding officer." WAC 480-07-825(9).

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that a judge's initial order shall specify whether "the highway shall continue at grade . . . or whether said highway shall be closed and travel thereon diverted to another channel, or any other change that the commission may find advisable or necessary."[5] Thus, with respect to a petition to close, the Commission may grant full closure, or it may condition closure on a "change that the commission may find advisable or necessary," i.e., on a private crossing agreement that provides for an emergency-use locked gate.

8. If the Commission grants the petition and orders some reasonable mitigation (such as constructing a turnaround), Mr. MacDonald explained "that the person that initiated the project that created the issue . . . would be responsible" for the mitigation "so that it does not impose on the other party a burden they didn't ask for."[6]

2. Denial Of The Petition And Retention Of The Public Grade Crossing At Hickox Road.

9. Should the Commission deny BNSF's petition and keep the crossing open, it would be improper for the Commission to order that warning device upgrades would be necessary at Stackpole and/or Hickox. While petitions for closure are governed by RCW 81.53.060, further signalization improvement is governed by RCW 81.53.261.[7] Under that statute, any municipality that deems the public safety requires signals or other warning devices at an at-grade railroad crossing "shall file with the utilities and transportation Commission a petition in writing, alleging that the public safety requires the installation of specified signals or other warning devices at such crossing or specified changes in the method and manner of existing

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[5] RCW 81.53.070. There is no Washington case law that cites to or explains RCW 81.53.070.

[6] MacDonald, TR:330:16-22.

[7] *See* MacDonald, TR 331:13-16 ("If we thought [current warnings] would [be adequate], we would have said -- filed for changing the warning devices, but we didn't, we filed for closure.").

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crossing warning devices."[8] This is separate and distinct from a petition to close a grade crossing, and such signalization changes would necessarily involve studies that were not performed for this docket.[9]

10. Although testimony regarding the insufficiency of alternative warning devices was relevant in this matter to show why closure is necessary, it would be irrelevant if the crossing is left open. Only in the event that a separate petition is filed would a diagnostic team be convened to determine whether any changes should be impletmented.[10] In that instance BNSF would also have to perform signal engineering and determine whether denial of the petition for closure would forestall the entire siding project.[11] This level of detail and analysis was not part of the petition to close the crossing. RCW 81.53.060 does not give the tribunal authority to order BNSF to upgrade Hickox or Stackpole in this proceeding if the Commission denies the petition; otherwise, the Code's separate provision for a petition/hearing to install alternative devices would be meaningless.

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[8] *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005) (citing RCW 81.53.261). RCW 81.53.261 also states: "Nothing in this section shall be deemed to foreclose the right of the interested parties to enter into an agreement, franchise or permit arrangement providing for the installation of signals or other warning devices at any such crossing or for the apportionment of the cost of installation and maintenance thereof. . . ." Should the WUTC deny BNSF's petition to close the Hickox crossing, BNSF could enter into an agreement with the City of Mount Vernon and Skagit County to upgrade the signalization after a diagnostic meeting However, as discussed herein, there are no alternative warning devices that would make the Hickox crossing acceptably safe to the public.

[9] RCW 81.53.261 has its own provisions for orders governing alternative warning devices. This makes it clear that a hearing to determine whether alternative devices are necessary is completely distinct from a hearing to determine whether closure is appropriate (orders governing closures fall within the scope of RCW 81.53.070).

[10] MacDonald, TR 315:7-15.

[11] *Id.*

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B. Washington Law Unambiguously States That The Proper Focus Of A WUTC Hearing To Close An At-Grade Crossing Should Be Closed Is *Public Safety.*

11. All at-grade crossings are dangerous, and the policy underlying the law is strongly against the allowance of such crossings.[12] In addition to dangers inherent at all grade crossings, "there are factors that may make a particular crossing especially hazardous," including "obstacles that limit the motorist's view of the tracks as the motorist approaches the crossing" and "the presence of a siding track in addition to a mainline track at the crossing."[13] The Federal Railroad Association has instructed that "state agencies should utilize their authority to close crossings whenever possible."[14] Because the inherent dangers of grade crossings, "the Commission generally will grant a petition to close a grade crossing unless the public need for the crossing outweighs the hazards that result from the crossing."[15]

12. This balancing test was defined by the Washington Supreme Court in 1949:

> Having found that the grade crossing herein is dangerous and unsafe, we must also consider the convenience and necessity of those using the crossing and whether the need of the crossing is ***so great*** that it must be kept open notwithstanding its dangerous condition.[16]

In determining whether public convenience and need outweigh the danger of the crossing, the Commission will consider

> the amount and character of travel on the road and on the highway, the availability of alternate crossings, whether the alternate crossings are less hazardous, and

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[12] *Burlington Northern R.R. Co. v. Skagit County,* Docket No. TR-940282 at p. 4 (December 1996); *State ex rel. Oregon-Washington R.R. & Navigation Co. v. Walla Walla County*, 5 Wn.2d 95, 104 P.2d 764 (1940) ("It needs no argument to demonstrate that the crossing of a railroad by a highway at grade is dangerous and generally undesirable. The policy of the law is against the allowance of such crossings."); *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146, 80 P.3d 406 (1938).

[13] *Skagit County,* Docket No. TR-940282 at p. 4.

[14] Exh. No. 101 p. 79.

[15] *Burlington Northern Railroad Company v. City of Ferndale*, Docket No. TR-940330 (March 1995).

[16] *Department of Transportation v. Snohomish County,* 35 Wn.2d 247, 254, 212 P.2d 829 (1949) (emphasis added).

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> ability of alternate crossings to handle any additional traffic that would result from the closure, and the effect of closing the crossing on public safety factors such as police control.[17]

Further, "only the present public need should be considered in determining whether to close a crossing."[18] These cases hold that the WUTC should grant a request for closure of a presumptively dangerous crossing absent compelling evidence of a great ***present*** need for the crossing. The parties opposing closure have not met that burden.

13. Public safety outweighs detrimental inconvenience to the public.[19] Other courts addressing crossing closures have agreed. It "has long been the policy of the Commission to regard public safety as weighing more heavily in the balancing of the two interests and to place public safety above that of public convenience."[20] As the court in *State ex rel. City of St. Joseph v. Pub. Serv. Comm'n* aptly explained, the Commission

> should not exercise its discretion in favor of creating a crossing with a high potential for danger to the public, in order to eliminate inconvenience to the public. Obviously, the policy so stated applies with equal force whether the issue be opening a new crossing or closing an existing crossing if the crossing in question is determined to present unusual or exceptional danger to the public.[21]

It is "not necessary to await the occurrence of a great accident" to "determine that a railroad crossing is exceptionally hazardous." [22]

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[17] *Skagit County,* Docket No. TR-940282 at p. 4 (citing *Ferndale*, Docket No. TR-940330).

[18] *Ferndale*, Docket No. TR-940330 at p. 8.

[19] *See, e.g., Leathers v. Mo. Hwy. & Transp. Comm'n*, 961 S.W.2d 83, 87 (Mo. App. Ct. 1997) ("The Commission places the consideration of public safety above that of public convenience.").

[20] *State ex rel. City of St. Joseph v. Pub. Serv. Comm'n*, 713 S.W.2d 593, 597 (Mo. App. Ct. 1986); *see also Prosser v. Seaboard Air Line R. Co.*, 216 S.C. 33, 39, 56 S.E.2d 591 (S.C. 1949) ("This case further holds that public safety is paramount to that of public convenience and necessity, and with this we find no fault.").

[21] *St. Joseph*, 713 S.W.2d at 597.

[22] *Id.*

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14. When a condition is inherently dangerous or misleading to the public, a governmental entity has a duty to safeguard against that condition.[23] The "inherently dangerous formulation" recognizes that as the danger becomes greater, the governmental entity is required to "exercise caution commensurate with it."[24] The existence of an unusual hazard may require the governmental entity to "exercise greater care than would be sufficient in other settings."[25] This reasoning extends to the WUTC's decision whether to close an inherently dangerous crossing in the middle of a siding track. Since the hazard is greater than that of a road intersecting a single mainline track, the Commission must "exercise caution commensurate" with the heightened danger.

15. Many individuals making public comments at the Mount Vernon hearing emphasized the priority of safety. April Axthelm of Dike Road wrote to the Commission that "[t]he job of the government is first and foremost to provide for the public health and safety of the people whom they govern. Any other priority is a breach of trust. . . ."[26] In this case, the most compelling threat to public safety is not the need to evacuate during a flood event, or an infrequent response to an emergency call. Those issues can be easily mitigated with a locked gate and use of alternate routes. The biggest threat to public safety is the unusual and exceptional danger presented by an at-grade crossing in the middle of a siding track, where passenger trains are allowed to reach speeds of 79 miles per hour.

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[23] *Owen v. BNSF*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

[24] *Id.*

[25] *Id.*

[26] *See* Public Comment of April Axthelm, dated May 29, 2007.

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C. Site-specific Hazards At Hickox Will Create A "Perfect Storm" For Provoking Unsafe Motorist And Pedestrian Behavior.

1. Once The Siding Track Is Extended Through Hickox, Unique Dangers Will Exist For Motorists And Pedestrians.

16. When the siding track is extended through Hickox Road, both freight and passenger trains will frequently "meet and pass" at the siding.[27] Freight trains will be parked across or very near the crossing for up to hours at a time.[28] BNSF Assistant Terminal Superintendent Mr. Gordon described how a siding track alters a grade crossing based on a safety standpoint:

> Siding track creates any number of hazards. First, you have the inherent danger in crossing two sets of railroad tracks. Second, trains parked in the siding track block motorists' views of trains approaching a crossing on the mainline track. Third, the warning signals may be confusing to drivers and pedestrians when two tracks are involved instead of one and a train is parked on the siding track. Fourth, it is very dangerous for pedestrians to cross near parked trains that are subject to move at any time, where the conductor may be more than a mile away from the pedestrian(s) because of the length of the train. Fifth, emergency personnel rushing to an incident may approach the crossing too hastily and have trouble negotiating the line of sight around a train parked in the siding.[29]

Railroad safety expert Mr. Peterson's testimony affirmed BNSF's concerns: Mr. Peterson has seen "all too many times, where when a parked train is relatively close to a crossing, that often that is what causes a motorist to mistake that for being a reason that the signals are operating and then ignore and violate the law and pass the signals."[30]

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[27] McIntyre, Exh. No. 2 p. 3:14-22; *see* Gordon, Exh. No. 1 p. 3:2-4.

[28] Gordon, Exh. No. 1 p. 2:23-24; McIntyre, Exh. No. 2 p. 4:1-6.

[29] Gordon, Exh. No. 1 p. 3:6-15; *see* McIntyre, Exh. No. 2 p. 6:1-11 (describing scenario where driver mistakenly believes parked train causes "fluke" warning signal, drives around the gates and is hit by a train on the mainline track - "because the driver couldn't see the mainline train and was confused by (or ignored) the warning devices"); *see also* MacDonald, Exh. No. 7 p. 3:3-11(explaining safety concerns that would exist if the Hickox crossing remains open to public travel).

[30] Peterson ,TR 582:1-5; *see also* MacDonald, Exh. No. 7 p.4:14-16 ("It is my experience that drivers tend to disregard warning devices when they believe the cause fo the activation is the nearby train that is not moving. This creates the potential for a driver to violate the warning devices and drive into the path of an oncoming train.").

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17. *State of Missouri v. City of St. Joseph* provides guidance here.[31] In *St. Joseph*, BNSF's predecessor applied to close a grade crossing that traversed both mainline and yard tracks on the grounds that the "number of tracks" and "reduction in visibility by reason of standing box cars" presented a hazard to public safety that justified closing the crossing to motorists.[32] The City intervened and opposed the closure: "[p]articularly stressed was the delay in response time by fire and police equipment which would otherwise use [the crossing at issue] but, after the closure, would be forced to seek alternate routes."[33] In those hearings, like the hearing in Mount Vernon, witnesses testified that the crossing was uniquely and unusually dangerous, that the warning devices would activate frequently, and that the warnings would lose credibility so that the motoring public ignored them.[34]

18. Similar to this case, the *St. Joseph* hearing also elicited expert testimony that

> the combination of slow movement trains during switching operations with the less frequent passage of through trains at higher speeds causes a motorist to assume, if he observes the slower train activity first, that all trains using the tracks will be traveling slowly; . . . there is increased danger that a motorist will wait the passage of one train but will fail to see a second train going in the opposite direction; [and] obstruction to visibility caused by freight cars being held on . . . tracks near [a] crossing [causes] motorists [to] encounter difficulty seeing trains on . . . other tracks.[35]

The court affirmed the Commission's order to close the crossing.[36]

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[31] *St. Joseph,* 713 S.W.2d 593.

[32] *Id. at* 594.

[33] *Id.*

[34] *Id.* at 596.

[35] *Id.*

[36] *Id.* at 598.

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2. Public Crossings Do Not Belong In The Middle Of Active Siding Tracks.

19. There was no evidence that even ***one*** at-grade public crossing exists in the middle of a siding track with the factors that would be involved at Hickox.[37] Mr. MacDonald, BNSF's Manager Engineering, testified BNSF does not have open crossings in the middle of other siding tracks that are subject to frequent blockage:

> Q. And to your knowledge and having reviewed those documents and the types of sidings, do you have other circumstances where siding tracks are designed for long as you called them trains for meets and passes that would be blocked for long periods of time with a crossing in the middle?
>
> A. No.
>
> Q. Why is that?
>
> A. It would take away -- you effectively close the crossing. You create a driver expectation that the gates are down and they're functioning but this train is going to sit here, so you create a safety issue in and of itself by doing so, so we wouldn't design for a new condition to create that.[38]

Neither the City, County, Fire District nor intervener farmers pointed to any other crossing in Mount Vernon or Skagit County with such conditions. Commission staff did not identify a similar crossing in Washington State, and although WUTC staff retained a national railroad expert from Columbus, Ohio, neither staff nor Mr. Zeinz provided a single example of an open

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[37] Although opposing parties have attempted to characteriz the Blackburn crossing as an example of a crossing through a siding track, *see* Thompson, TR 709: 9-10, the hazards that will exist at Hickox (if left open) do not exist at Blackburn. Mr. MacDonald testified that "Blackburn is at . . . the end of the siding. . . . It wouldn't be blocked," and that parked trains will be "held back." MacDonald, TR 344:19-22. The section of the siding track that crosses Blackburn is for use as an "on ramp" for trains to enter the siding and decelerate, or to accelerate out onto the main line. MacDonald, TR 356:10-18.

Mr. Gordon agreed that Blackburn does not present the type of hazard that the Hickox crossing would if left open to public travel. He explained that because parked trains do not stop close to the Blackburn crossing, it

> significantly reduces the risk of: (1) blocked or partially blocked views of trains on the mainline track, (2) drivers trying to get through a partially-blocked crossing, (3) emergency personnel trying to negotiate the line of sight around a parked train, and (4) pedestrians using a crossing near parked trains.

Exh. No. 95; Gordon, TR 688:14-18; 718:14-18.

The Blackburn crossing also "has . . .traffic signals interconnected with the active protection at the crossing itself, and thus provides as much with any controlled traffic intersection, the means to control motor vehicle traffic when a train is indeed going to be occupying that crossing." Peterson, TR 596:4-9.

[38] MacDonald, TR 345:16-346:4.

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crossing in the middle of a siding track anywhere in the country. Mr. Zeinz explained why such crossings would be hard, if not impossible, to find:

> I can't speak specifically to why that is in the state of Washington, but it's commonly accepted by all the people in my profession from railroads, from state highway departments, from regulatory agencies where I have had experience, if you have a situation where a crossing is going to be routinely blocked by a train, generally the best practice is not to have a crossing there at all, either try and close it or grade separate it or something. There are a number of corridors where 4-quadrant gates have been installed on a number of crossings, North Carolina line sealed corridor is one, the high speed corridor between Chicago and St. Louis is another one. ***I'm not familiar of any of those locations being locations where trains frequently stop and hold a crossing for an extended period of time, because it's generally been my experience that those are the kinds of situations where we really try to avoid having crossings.***[39]

If similar crossings exist, the opposing parties certainly would have pointed them out to dispel BNSF and WSDOT's heightened safety concerns at Hickox. As has often been said, "there are times when silence has the loudest voice." The other parties' silence speaks loudly here.

3. <u>The Hazards At Hickox Increase The Chance Of Risky Motorist And Pedestrian Behavior, Especially For Drivers Who Are Familiar With The Crossing.</u>

20. Mr. MacDonald testified that in his experience,

> drivers become frustrated with extended periods of lowered crossing gates and tend to make decisions that either at their next crossing they may attempt to beat the train because they don't want to wait or they don't want to do the other route. [40]

Ms. McIntyre testified that motorists drive around - or through - gates "every day."[41]

21. Mr. Zeinz described a fundamental reason for drivers' risk-taking behavior.

> Q. Is it safe to say that in your experience you find that a lot of people just don't appreciate what the likelihood of the result would be of a collision between a vehicle and a train?

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[39] Zeinz, TR 1195:2-19 (emphasis added).

[40] MacDonald, TR 304:11-15.

[41] McIntyre, TR 678:3-7.

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A. I think they comprehend what the likely result could be. I think they underestimate the risk of it occurring.[42]

22. Motorists and pedestrians have misconceptions about the timing of gates and the arrival of passing trains.[43] Drivers fail to perceive the full threat or risk of a slow moving train, and there are even "a number of drivers who perceive that the train is going to stop for them" and they are mistaken.[44]

23. The railroad witnesses and experts consistently testified that when a train is stopped or parked in close proximity to a crossing and the warning lights are activated and the gates are deployed, drivers, bicyclists and pedestrians will conclude that the stationary train is the reason why the lights are active and the gates are down. Mr. Zeinz agreed its "a fact" that when those drivers see the train sitting there for a period of time without moving, after a while they "get the notion, well, that's why these gates are down, and he's not moving, so obviously it should be safe for me to cross, so that's partly when they make the decision to drive around the gates."[45] Ms. McIntyre testified that bicyclists ignore or duck under gates and also try to cross stopped trains by lifting their bicycles over or between the train cars.[46] Ms. McIntyre also testified that pedestrians may be tempted to walk under, over, near and around stationary trains.[47] That

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[42] Zeinz, TR 1146:18-24.

[43] Zeinz, TR 1147:10-13.

[44] Zeinz, TR 1148:2-10.

[45] *See* Zeinz, TR 1162:8-21.

[46] McIntyre, TR 675:21-676:10.

[47] McIntyre, Exh. No. 2 p. 7:12-13. While Hickox Road may not have a relatively high level of pedestrian use, Ms. McIntyre saw a pedestrian walking down the street on one of her visits to the Hickox crossing. McIntyre, TR 671:9-12.

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invites dismemberment or death when the train – the engines of which may be a half-mile away – starts to move without warning.[48]

24. "Follow the leader gate running" is another serious problem at crossings that Mr. Zeinz described as follows:

> Sometimes there will be a situation where the gates are down, lights are flashing, it may or may not be apparent that there is a train approaching the crossing. For some reason, the first driver in a queue decides that he or she is going to drive around the gates, does so, gets across the crossing safely. The person sitting behind them sees what happened, decides, well, if they can get through, I can get through, so they go around the gates and go across the crossing. And the next person and the next person, and it becomes a follow the leader. And usually if and when the train shows up and an accident occurs, often it's not the first car that gets hit, it's typically the second or third or fourth car that goes through that gets hit.[49]

25. Additional safety concerns exist where drivers are familiar with the location of the crossing. It is a "common accident statistic" that the vast majority of accidents typically occur closer to the driver's home or place of work, because "familiarity breeds complacency."[50] Mr. Zeinz explained:

> Well, we've got a lot of drivers that are in a hurry. If they approach a crossing that they're familiar with and they know if they stop they could stop for a long time,

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[48] *See* McIntyre Exh. No. 2 p. 7:13 ("This can have fatal consequences if the engineer cannot see the trespasser); *see also Lerette v. Director General of Railroads*, 306 Ill. 348, 137 N.E. 811 (Il. 1922):

> About 1 o'clock a.m. Sunday, September 29, 1918, Louis Lerette, appellee, approached the tracks of the Chicago, Burlington & Quincy Railroad Company at Creve Coeur street, in the city of LaSalle. There are four tracks at this point. The north track is a switch track, known as the "house track." When appellee reached the crossing, he found the house track blocked by a long string of freight cars. There were cars as far as he could see in each direction. He waited for a few minutes, but the cars did not move. Then he sat down at the side of the street, made, lighted, and smoked a cigarette, and then investigated to see if the string of cars was likely to be moved soon. He had waited for about 20 minutes, and during that time he had not seen or heard an engine and the cars had not moved. This crossing was not used much after midnight, and ***frequently cars stood upon the crossing from midnight until morning***. After satisfying himself that the string of cars was not going to move, appellee began to climb over the bumper between two of the cars. Just as he was getting onto the bumper, the string of cars without warning was jerked suddenly, and appellee fell backwards, and the wheel ran over his right leg, crushing it so that it had to be amputated.

(emphasis added).

[49] Zeinz ,TR 1159:13-1160:5.

[50] Zeinz, TR 1160:7-1161:3.

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there's a greater tendency that they're going to try to get across the crossing before the train arrives. They're going to do it by whatever way they can.[51]

Because a very large part of the traffic at the Hickox crossing involves travel to and from the few local farms and small number of residents of the area affected by closure, drivers will quickly become familiar with the crossing and the capabilities and limits of its warning devices, thereby increasing safety risks. The conditions at Hickox will generate a "perfect storm" for encouraging pedestrians and drivers to make hazardous decisions.

4. The Result Of A Train-Vehicle Collision, Especially With A Passenger Train, Could Be Horrific.

26. The Bourbonnais, Illinois Amtrak/semi-trailer grade crossing collision is a tragic example of the catastrophic consequences of a passenger train fatality collision. On March 15, 1999, an Amtrak train carrying 228 passengers and employees struck a loaded trailer of a commercial tractor-semitrailer that was trying to cross the tracks before the arrival of the train.[52] The National Transportation Safety Board determined the cause of the action was the "truckdriver's inappropriate response to the grade crossing warning devices and his judgment, likely impaired by fatigue, that he could cross the tracks before the arrival of the train."[53] The locomotives and many of the cars derailed, and the derailed Amtrak cars struck several freight cars standing on an adjacent siding.[54] Eleven people were killed, and 122 people were transported to hospitals.[55] Total damages were estimated at $14 million in equipment damages,

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[51] Zeinz, TR 1184:12-18.

[52] Exh. No. 145 at p. v.

[53] Exh. No. 145 pp. 3,5. The truckdriver stated that the crossing lights started flashing when he was "right on top of the track" and that he "didn't think the train was moving that fast."

[54] *Id.*

[55] *Id.*

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and $295,000 worth of damage to track and associated structures.[56] Both gate arms at the crossing were also broken.[57]

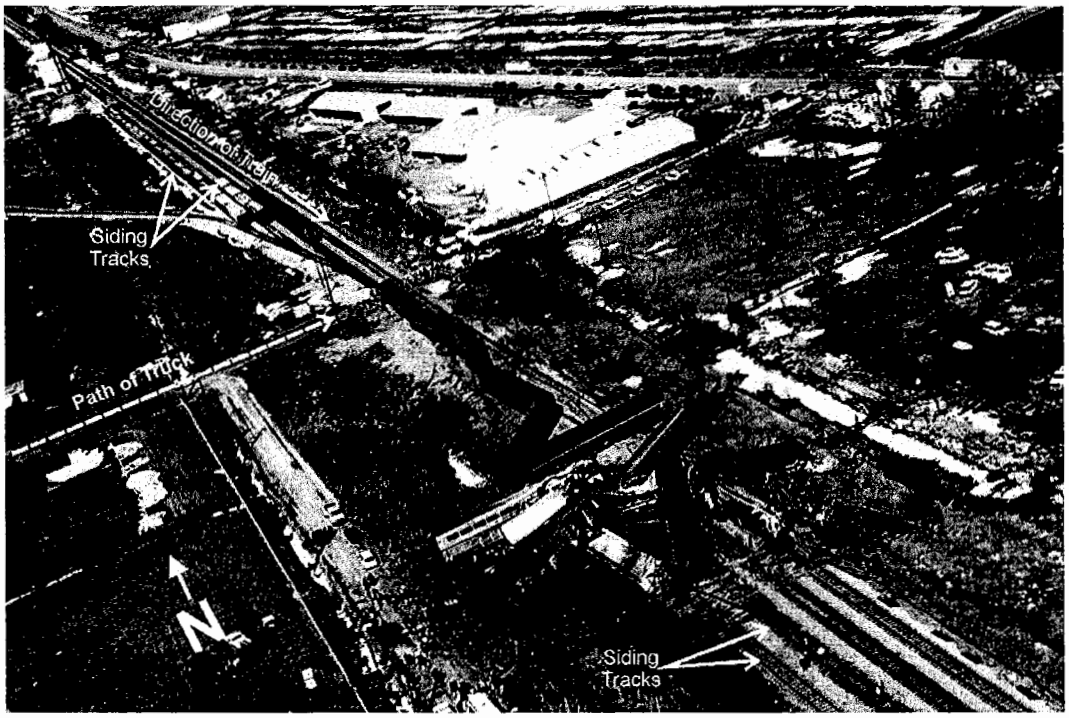

Figure 1 (Exh. No. 145 p. 3).

Like the Hickox crossing, the Bourbonnais crossing was used by large commercial trucks, which pose "a greater risk to the possibility of causing injury or death on the train or derailing the train" than a passenger car.[58] Like the Hickox crossing, the Bourbonnais crossing had siding tracks on either side of the road (although, as evident in *Figure 1* above, the Bourbonnais crossing did not have siding tracks running through the crossing itself).[59] Like the mainline track running through Hickox, the maximum operating speed for passenger trains along the

[56] Exh. No. 145 pp. 3,5.

[57] Exh. No. 145 pp. 26-27.

[58] Zeinz, TR 1182:11-18.

[59] Exh. No. 145 p. 3.

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Bourbonnais track was 79 mph, and 60 mph for freight trains.[60] Like the Hickox crossing, the Bourbonnais crossing had an alternate crossing available approximately one mile away.[61] After the Bourbonnais crash, the crossing was closed.[62] As the WUTC staff's expert testified regarding that kind of accident: "It only takes one."[63]

5. Train Crew Safety At Risk.

27. It is also important to remember that occupants of the motor vehicles are not the only parties involved in crossing collisions. Crossing collisions can have "devastating effects" on train crew members.[64] BNSF employee Tom Holley described the feelings and thoughts he experienced "going down a track at 50 mph and hitting a semi. . . . The reaction time [is] long enough to think about some of the possibilities like God I hope that thing isn't loaded with car batteries, or coleman fuel, bricks, propane bottles, etc."[65] When Mr. Holley realized his train was about to hit a semi-truck, the crew "had little time to react, we placed the train in emergency, bailed off the drivers, jumped to the floor, covered up our eyes and heads with what we could and asked, why did that SOB run the stop signs?"[66] As Mr. Holley pointed out, the "unfortunate few who hit the folks have to live with it the rest of our lives" and wonder if they "will ever be able to go over a crossing at grade without seeing this again."[67]

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[60] Exh. No. 145 p. 20.

[61] Zeinz, TR 1173:9-12.

[62] *Id.*

[63] Zeinz, TR1221:8. Mr. Zeinz was involved on that railroad at that time. S*ee* Zeinz, TR 1168:13.

[64] Zeinz, TR 1127:13-17.

[65] Exh. No. 143 p. 1.

[66] *Id.*

[67] *Id.*

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28. In summary, the City of Mount Vernon, Skagit County, fire district, and concerned citizens have disregarded or simply dismissed the risk of serious accidents and deaths created by the conditions at the Hickox crossing when the siding is extended. There was a lot of testimony about planning for and minimizing the harm of an 100-year flood event, but the opposing parties offered no testimony regarding the potential catastrophe of the same or greater magnitude, or the loss of life resulting from a collision between an Amtrak train and a commercial truck or farm vehicle. It would be an equally devastating event that would happen without warning. But potential for a tragedy at the Hickox crossing is not limited to collisions involving large trucks and trains. The more common collision fatalities involve passenger vehicles where the force of a train hitting a car has the same impact as a car crushing a can of soda.[68]

D. The Opposing Parties Have Not Demonstrated That Public Convenience And Necessity Of The Hickox Crossing Outweighs The Safety Benefits Of Closure.

29. As a preliminary matter, it is noteworthy that crime fighting in the subject area has been a nonissue throughout these proceedings. Criminal activity and police response time were never addressed in the opposing parties' prefiled or live testimony. The only evidence addressing an impact on police response is found in the *Hickox Road Railway Crossing Closure Traffic Impact Analysis*.[69] The *Analysis* reports that Dave Corrion, Traffic Sergeant of the Skagit County Sheriff's office noted that "the closure of the BNSF/Hickox Road railway crossing should not have an appreciable impact on response time."[70] Likewise, Lieutenant Jerry Dodd of

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[68] *See* Exh. No. 144 p. 13; Zeinz, TR 1146:7-13.

[69] *See* Exh. No. 13.

[70] Exh. No. 13 p. 32.

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the Mount Vernon Police Department "stated that crime in the study area is very minimal; therefore, the closure will have minimal impact on their activities."[71]

1. Flood Fighting And/Or Flood Evacuation Procedures: Safety Concerns Are Addressed By An Emergency-Use Gate.

30. The public's apprehension about flood fighting and evacuation merits a closer look at the risk of flooding at Hickox, as well as how a gated private crossing mitigates those flood concerns.

a. Hickox Road will not flood until there is a 50-year (or 100-year) flood event / neighboring evacuation routes will be available.

31. The Army Corp of Engineers' projected flooding maps (the only Skagit County flooding study admitted into evidence) show that Hickox, Britt, Dike and Stackpole Roads would not be flooded during a 10 or 25-year flood event. The evidence on record shows that should future flood waters ever reach the area affected by closure, Hickox Road will be under water before Britt, Dike or Stackpole Roads.[72] Hickox Road would not be flooded until a 50-year flood event.[73] Notably, even during a 50-year flood event, the study shows that evacuation routes via Dike Road and Stackpole would be available.[74] Skagit County's Emergency Management Coordinator, Mr. Watkinson, acknowledged that:

> Q. And it's fair to say that according at least to the depiction here Hickox Road is under water in the 50 year flood event before Dike Road, Britt Road, or Stackpole Road; is that correct?
>
> A. According to the studies that the Corps did, yes.[75]

Mr. Watkinson further acknowledged that in response to questions by Judge Torem:

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[71] Exh. No. 13 p. 32.

[72] Exh. No. 117 pp. 5-6.

[73] *Id.*

[74] *Id.* Neither Britt, Dike, nor Stackpole Road would have any standing water until a 75-year flood event.

[75] Watkinson, TR 1058:25-1059:5.

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Q. Mr. Watkinson, is it your understanding that water seeks the lowest point?

A. That's correct.

Q. So I think Ms. Endres wants us to conclude from these drawings from the Corps that Hickox Road would be lower than places there's no water; would you agree with that?

A. I would agree.[76]

Hickox would be unnecessary and unusable as an evacuation route should flooding be so severe that it covers Britt, Dike or Stackpole Roads, since Hickox would be under water first.[77]

32. None of the witnesses could recall the last time Hickox was used as an evacuation route. The County's flooding management coordinator, Mr. Watkinson, agreed that although his prefiled testimony stated that "Hickox Road would be especially important in the event that flooding has rendered other local access roads (such as Dike Road, Britt Road, or West Stackpole Road) impassable," he did not know when the last time Hickox Road was used as an evacuation route where Stackpole Road was flooded.[78] No parties provided testimony of any flood event where Dike Road or Britt Road were flooded before Hickox. The only credible evidence is that in the event of a catastrophic flood, Hickox Road would flood, and therefore be impassable, well before the adjacent alternative routes.

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[76] Watkinson, TR 1060:3-10.

[77] Exh. No. 117, pp. 5-6.

[78] Watkinson, TR 1050:1-19.

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b. Public officials admit that an emergency-use gate would be worked into flood planning.

33. Commissioner Dahlstedt admitted that an emergency-use gate "would be a compromise."[79] Mr. Watkinson also testified that an emergency-use locked gate would solve his flooding concerns:

> Q. [A]ssume that with an emergency gate the crossing would be able to be opened if there was a flooding emergency so that residents would be able to have an evacuation route as well as ingress for sand bagging supplies and riprap. Would you agree that that would satisfy your concerns with respect to flooding should the crossing be no longer a public crossing?
>
> A. I agree.[80]

He also testified that opening the gate would be worked into public officials' flood planning:

> Q. Isn't it important that if the crossing was closed and there were locked gates that someone would be aware of the situation and make sure they were unlocked in the event of a flooding emergency?
>
> . . .
>
> A. It is, it would be under this circumstance, yes.
>
> Q. Is that something that the County would build into its planning at this location for flood operations?
>
> A. If that was -- if the crossing was eliminated, we would have to build some provision in for that.[81]

34. Glen Brautaset, the Assistant Fire Chief and Fire Marshall for the City of Mount Vernon, agreed that he "wouldn't expect a flood fighting operation to occur suddenly without some advance notice to the people involved."[82] Mr. Brautaset further affirmed Judge Torem's

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[79] Dahlstedt, TR 457:14.

[80] Watkinson, TR 1061:8-16.

[81] Watknson, TR 1070: 19-23; 1071:15-24.

[82] Brautaset, TR 994:8-11.

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presumptiond that if a "flood evacuation decision had been made," opening the gate "would move very quickly to the top of an incident commander's list."[83]

35. Farmer Jeffrey Boon also acknowledged that an emergency-use gate would alleviate his concerns about evacuating cows:

> Q. All right. With that in mind, if you worked under the assumption that this would be part of a process of a larger flood evacuation and flood fighting operation that affected more than just West Valley Farms, would that satisfy your concerns that somebody if that word was given had opened the access for that crossing?
>
> A. Yeah.[84]

2. The Amount Of Traffic Through Hickox Is Extremely Low And Suitable Alternative Crossings Exist Nearby.

a. Every crossing closure causes an adverse impact on travel.

36. The WUTC has noted closure of crossings "necessarily inconveniences those whose crossing is eliminated in favor of adjacent crossings," but that doing so "when practical . . . promotes public safety."[85] Other states agree that "[n]ecessarily, the closing of any road which enjoys some public use will cause inconvenience to some extent just as the closing of a grade crossing over actively used railroad tracks will always promote safety by eliminating the prospect of an accident."[86] Commission's railroad expert, Mr. Zeinz, agreed that adverse travel is a common factor at every grade crossing closure.[87]

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[83] Brautaset, TR 1016:12-15.

[84] Boon, TR 1109:6-13.

[85] *Skagit County,* Docket No. TR-940282 at p. 7.

[86] *St. Joseph*, 713 S.W.2d at 596.

[87] Zeinz, TR at 1214:24-1215:1.

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37. The tribunal received public comment from citizens who would be inconvenienced by closure.[88] Virtually none of the comments voluntarily admitted the danger this type of open crossing would involve, or even that railroad crossings are dangerous. Not one citizen opposed to closure recognized a balancing test or objective look at all of the issues involved. Many asked rhetorically about the worth of one lost human life. We can only wonder what those persons would say if their family members or neighbors were tragically killed in a collision with a train, or in hindsight, if they would question whether the crossing should have been closed to prevent that loss of human life. Notably, the closure of a crossing involving more than one set of railroad tracks was upheld even though more than ***1,800 residents*** signed a petition against the closure.[89]

b. The traffic count at Hickox is low.

38. Compared to other intersections in Mount Vernon, the Average Annual Daily Traffic Count ("AADT") of Hickox Road is extremely low.[90] According to FRA data, Hickox Road has an AADT of 391; comparatively, the Blackburn intersection has an AADT of 4,148, Mount Vernon's Kincaid Street crossings (Crossing Nos. 084744N and 084759D) have AADTs of 17,000 and 26,000, and Mount Vernon's North 4th Street crossing (Crossing No. 084754U) has an AADT of 14,400.[91]

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[88] Public Comments, TR at 401-402; 409-458; 813; 819-840.

[89] *See, e.g., Klamath County v. DOT*, 201 Or.App. 10, 12, 116 P.3d 924 (Or. Ct. App. 2005).

[90] *See generally* Exh. No. 102.

[91] Exh. No. 102. pp. 4-5.

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c. Alternative crossings exist nearby / signalization would improve at Stackpole.

39. The Stackpole crossing is approximately one mile South of Hickox, and the Blackburn crossing is approximately 1.5 miles north of Hickox.[92] In its petition to close Hickox, BNSF provided to signalize the Stackpole crossing.[93] Mr. Jeffrey Boon testified that his concerns about farm equipment using the Stackpole crossing would be alleviated if it had active warning devices.[94] Dr. Winkes agreed that installing lights and gates would make her feel safer traveling across the tracks at that crossing.[95] No witness testified that upgrading Stackpole would fail to mollify their concern about diverting vehicles to Stackpole. As described in Part H(1), below, the Blackburn crossing will not experience an increase in traffic volume from closing the Hickox crossing.

d. No evidence to substantiate public concern that closing hickox crossing would make the Mount Vernon Christian School zone more dangerous.

40. Concerns that the Christian school zone or Blackburn will be suddenly inundated by oversized farm vehicles is simply unsupported by the record. First, school principal DeJong admitted that he had not undertaken an independent traffic study to analyze his concerns:

> Q. Okay. Have you undertaken an analysis to determine what would constitute a substantially greater number of trips if Hickox Road crossing is closed?
>
> A. Your question is have I commissioned a study to do that?
>
> Q. Some type of analysis.
>
> A. No, other than my observations daily.

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[92] *See* Initial Filing, p.2.

[93] *Id.*

[94] Boon, TR 1106:14-19.

[95] Winkes, TR 873:6-9.

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Q. Okay, and talking with Mr. DeVlieger and some others?

A. No, we have not spoken directly about the increase. Just knowing farmland, I am assuming if they're going to not have access to one road, they're going to come down another, and the closest one is Blackburn.

Q. All right.

A. That's my assumption.

Q. Most of the farm area that's shown on what we affectionately refer to as the affected area by the closure of Hickox Road is all farther south of the Britt Road where it intersects with Dike Road; do you agree with that?

A. Yes, probably, yeah.[96]

41. Second, Mr. DeJong's "daily observations" are of ***current*** use of agricultural trucks along Blackburn Road. He admitted to lackding knowledge about use of the Stackpole crossing:

Q. All right. And you have indicated in your prefiled testimony, and I'm referring to paragraph 5, that consequently, right in the middle of that paragraph, some agricultural traffic for tilling the soil, planting crops, harvesting crops, and hauling supplies does travel on Blackburn Road.

A. Occasionally, yes.

. . .

Q. Are you aware if trucks and farm equipment currently use Stackpole Road?

A. No.[97]

42. Finally, Mr. DeJong testified that the streets around the school had recently been narrowed, that narrowing of roads reduces vehicle speeds, and that children are dropped off at school in a driving circle, not on the main road.[98] He agreed that "the narrower streets and the

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[96] DeJong, TR: 1094:5-15; 1095:1-8.

[97] DeJong, TR 1094: 5-11; 1095:9-11.

[98] *See* DeJong, TR 1095:15-24; 1098:2-14.

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slower speed in front of the school" would already "discourage more large farm vehicles from wanting to come through there during the time when you've got kids being dropped off." He stated that "I don't think they want to mix with children and traffic and kids. I don't think they want to."[99]

43. Based on his testimony, it is clear that the public's and Mr. DeJong's concerns stem from an instinctive but erroneous assumption about the effect of closure, adopted without an understanding of the actual traffic flows and projected use of Stackpole. There is no objective evidence that the number of farm equipment using the Blackburn crossing will increase much, if at all, beyond its current level if the Hickox crossing is closed.

3. The Alleged Adverse Impact On Emergency Response Time Is Not Supported.

44. The WUTC has determined an "argument that [a] crossing should remain open because it allows faster response in the event of fire or other emergency does not justify leaving the crossing open" where "[a]ccess via a safer route is readily available, and the need for additional access does not outweigh the dangers posed by the crossing."[100]

a. The average emergency response time provided by the fire district is questionable at best.

45. The fire district provided a *Response Time Summary – Hickox Road Closure Study* with Officer Skrinde/Harman's testimony.[101] It states as follows:

> In 2005,[102] SCFD 3 responded to 12 service calls with a ***response average of 13 minutes of the first arriving engine company***. Add 4.5 minutes to the 13 minute

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[99] DeJong, TR 1100:16-23.

[100] *Skagit County,* Docket No. TR-940282 at p. 7 (December 1996) (citing *Union Pacific R.R. Co. v. Spokane County*, Docket No. TR-950177 at pp. 7-8 (July 1996)).

[101] *See* Exh. No. 86.

[102] Chief Harman admitted that this should have stated 2005-2007. *See* Harman, TR 926:17-21.

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average response time, and the projected response time average would be 17.5 minutes.[103]

As this matter progressed, it has become clear that the fire district's 13-minute average response time simply no support in the record.

46. First, the calculation was based on only twelve responses, a low number subject to skew, and those responses were the entire sampling for a three year period (2005-2007), not just 2005.[104] Second, Mr. Rabel clarified that of those twelve service calls, only eight were usable for various reasons (excluding mutual aid, for example).[105] Mr. Rabel admitted that the average response time of those ***eight incidents*** was "less than 13 minutes."[106] Third, although WSDOT sought further information by data request, the fire district declined to produce response data for the Conway station which also reportedly responds to the "affected area."[107] Response times from the Conway station are not impacted by the crossing closure. Fourth, although WSDOT requested information on all incidents and responses in the fire district's jurisdiction, the fire district declined without justification to produce reports for "insignificant" calls (i.e., why those response times were irrelevant to this matter even though they were there as emergency responders).[108] Last but not least, the fire district did not produce incident reports

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[103] Exh. No. 86 (emphasis added).

[104] Rabel, TR 371:3-5 ("If you're asking if larger numbers of incidents will give you a more accurate picture, yes, that's correct.); *see also EEOC v. American Nat'l Bank*, 680 F.2d 965, 968 n. 5 (4th Cir. 1982) ("Population samples of less than 30 to 40 are generally considered to be small samples and require special treatment in certain statistical analyses.") (citing P. Hoel & R. Jessen, Basic Statistics for Business and Economics, 190 (1977)).

[105] Rabel, TR 368:14-23.

[106] Rabel, TR 364:24-25.

[107] *See* Exh. Nos. 130; 133; *see also* Exh. No. 82 p. 6: 3-4 ("Skagit County Fire Protection District No. 3 is an all-volunteer fire district whose volunteers respond out of two fire stations, 'Cedardale' and 'Conway'").

[108] *See* Exh. No. 130; *see* Harman, TR 921:10-19.

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or response time data for years prior to 2005 although the reports were sought by data request.[109]

47. Chief Skrinde/Harman's prefiled testimony stated the fire district has a ***non-mandatory*** goal to respond to an emergency within 14 minutes, 80 percent of the time.[110] He testified that the "District currently meets this standard (*See below* . . . Exhibit A)" because it responded to the 12 service calls (of which Mr. Rabel relied on only 8) with an average response time of 13 minutes.[111]

48. "Exhibit A," the *Response Time Summary Hickox Rd Closure Study*, asserts that closing Hickox would add 4.5 minutes to that average, resulting in a projected response time of 17.5 minutes which would exceed the 14 minute ***non-mandatory*** goal.[112] As Mr. Rabel admitted, however, the 13 minute average was incorrect. A simple calculation of the average response time for the first responders to arrive at the incidents Mr. Rabel considered valid was 9.68 seconds, or 9 minutes 41 seconds.[113] Even adding 4.5 minutes, which estimate is questionable at best, the projected response time average would be only a few seconds above the fire district's 14-minute goal. The likely projected response time, however, will be even lower because emergency responders are legally allowed to surpass the posted speed limit.

49. More significantly, without calculating the mutual aid responders from the much closer City of Mount Vernon station, or ***all*** response times that were requested from the fire district but not provided, the additional 4.5 minutes has no credibility.

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[109] *See* Exh. No. 130.

[110] ~~Skrinde~~ Harman, Exh. No. 85 p. 8:15-16.

[111] *Id.* (parenthetical in original).

[112] Exh. No. 86.

[113] *See* Exh. No. 133 (Mr. Rabel used the following incidents: 2007-03122; 2007-03123; 2006-03202; 2006-03342; 2005-03219; 2005-03131; 2005-03021; and 2005-03048) (*see* Rabel, TR 394:22-25; 395:1-12).

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50. As mentioned above, the fire district's *Response Time Summary* indicates that "SCFD 3 had a response average for 13 minutes of the first arriving engine company" and that with closure, "projected response time average would be 17.5 minutes."[114] Leaving aside the actual nine minute (plus) average of the first responders, response time increases were calculated based on the "***posted speed limit.***"[115] It does not take judicial notice to point out that, under the law, emergency responders are neither required nor expected to drive at or below the posted speed limit.[116] Washington law allows an emergency responder to [e]xceed the maximum speed limits so long as he does not endanger life or property."[117] In this case, there is no evidence or testimony that responders drove at the posted speed limit when responding to the twelve fire and medical emergencies that led to the fire district's alleged 13 minute average-response time.

51. In fact, Chief Harman acknowledged that the responders travel up to ten miles per hour over the speed limit:

> A. Our speed limit out [on Frontage Road] is 50 miles an hour. The speed limit going up Dike Road is 35 county posted speed limit, but the engine, you know, they will do the best they can to, you know, ***they can exceed that to 5 to 10***. . . .
>
> . . .
>
> Q. ***The young guys probably push that a little***?
>
> A. ***[T]hey can push it, yes.***[118]

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[114] Exh. No. 86.

[115] *Id.* (emphasis added).

[116] See RCW 46.61.035.

[117] RCW 46.61.035(1)(c).

[118] Harman, TR 936:7-11; 15-16 (emphasis added).

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It is disingenuous and transparently self-serving to argue that "it's important that someone get on scene as quick as possible"[119] in a fire or medical emergency, admit that responders exceed the speed limit in order to do so, but then maximize the emergency response time increase using the posted speed limit. With the candor due the tribunal, the fire district's calculated response time increase should be disregarded.

b. The Hickox crossing is rarely used by emergency vehicles.

52. Although the opposing parties will argue that the FRA Grade Crossing Handbook states "[c]rossings frequently utilized by emergency vehicles should not be closed,"[120] the Hickox crossing is not "frequently utilized" by emergency vehicles. When asked to provide all evidence of "response time data of ***all*** emergency service providers that respond to medical aid or fire suppression service calls within Skagit County Fire Protection District No. 3's boundaries," the fire district provided incident reports for thirteen responses over a three year period, and one of the thirteen calls was cancelled before the responders reached their destination.[121] The *Traffic Impact Analysis* states that "according to the 2004 Fire in Washington Report, published by the Office of the State Fire Marshall, Skagit County Fire Protection District Three had only three reported incidents for all of 2004."[122]

53. More importantly, and as discussed below, Fire Chief Harman admitted that the shortest route from the Cedardale station to the most densely populated part of the "area affected by closure" is via the Blackburn crossing, not Hickox Road.[123] Therefore, since no records reflect the route taken by the Cedardale responders, Chief Harman's testimony indicates that

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[119] Harman, TR 918:16-17.

[120] *See* Exh. No. 101 p. 79.

[121] *See* Exh. No. 130 (emphasis added); Exh. No. 133.

[122] Exh. No. 13 p. 48.

[123] Harman, TR 933:14-25.

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substantially fewer than twelve incident responses over three years even used the Hickox crossing. But even if all twelve responses utilized the Hickox crossing during the three year period, however, such use averages reflect a maximum of only ***four responses per year***. This does not support the opposing parties' claim of "frequent" utilization.

c. The Hickox crossing is not the fastest way to access much of the "area affected by closure."

54. Closing the Hickox Road crossing will not bar emergency vehicles from access to the area west of the rail tracks. The alternative routes perhaps more often than not will be the quickest route regardless of whether the Hickox crossing is open, closed or blocked by a stopped train.

55. Chief Harman's testimony on that issue was quite compelling:

> Q. Okay. With regard to Cedardale, if you had a response down toward Stackpole or even south of that, would you come down across the freeway across I guess it's called East Hickox and take a left onto the frontage road?
>
> A. We would.
>
> Q. And has that happened a number of times?
>
> A. It happens occasional, yes.
>
> Q. Okay. And then you could either go out Stackpole to the west or keep going south down the frontage road?
>
> A. Yes.[124]

56. Chief Harman also testified that crossing the tracks at Blackburn is the quickest route to the most densely populated part of the "area affected by closure":

> Q. Now there's places along the Britt Road where it, just before it joins Blackburn Road, are you familiar with that location and intersection?
>
> A. Yes.

[124] Harman, TR 937:23-938:9.

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Q. And there is a number of houses right along there, it's fairly dense compared to the rest of the so-called affected area?

A. Yes.

Q. And that area from Cedardale is actually quicker to reach, isn't it, by going down Highway 99 and across Blackburn?

A. It is.[125]

Given the low frequency of emergency responses in the "affected area" and the availability of alternate routes (preferable regardless of whether Hickox is available), the opposing parties have not shown that Hickox is a crucial crossing for fire or medical service calls.

d. Risk of delay to emergency vehicles by the extra distance, if any, is likely offset by the risk of delay from trains blocking the Hickox crossing.

57. Even if the Hickox crossing was left open to public travel, trains may be stopped on the siding track for up to several hours.[126] If left open, emergency responders run the risk that the Hickox crossing would be blocked to traffic anyway. Chief Harman described the district's protocol if the crossing is blocked by a train:

> Protocol is if they approach the -- if they have made the turn, they approach, the arms and lights flashing, is that they are to stop and radio communication to Battalion 3 or the other responding units or responding units out at Station 1 that they are being held up by a train, and communication is made to the dispatch center. We may have Engine 111 dispatched out of Mount Vernon, or we have an engine coming up from Station 1. So we try to cover that, because that is a delay for our response time, so.[127]

If the crossing is closed, it will provide additional certainty to the fire district's routes and avoid the risk of being forced to dispatch another unit, increasing the response time while the original responding unit sits at the blocked crossing or backtracks. Other courts have noted that

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[125] Harman, TR 933:14-25 (using Exh. No. 26, flood evacuation map).

[126] Gordon, Ex. No. 1 p. 2:24.

[127] Harman, TR 939:14-24.

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a benefit of closing a crossing is providing additional certainty to routes taken by emergency vehicles.[128]

e. The City of Mount Vernon provides mutual aid responders from a fire station located just north of the Blackburn crossing, which is staffed 24 hours per day.

58. The fire district has mutual aid agreements with Skagit County and the City of Mount Vernon. Chief Harman testified the fire district has

> a mutual aid agreement County, we also have a mutual aid agreement specifically with the City of Mount Vernon. We are second engine dispatch on structure fire, and they also will be dispatched to mutual aid us on fire response, medical response, if they're available.[129]

Judge Torem asked if it was the chief's "experience on any calls in that area, perhaps under [the] mutual aid agreement with the City, that the City's response from Fire Station 1 gets there first?" Chief Harman affirmed that the City "will get there first if they're available," even if the emergency is in the fire district's "primary area of responsibility by political boundaries."[130] Chief Harman further explained that the Mount Vernon Station 1 is "substantially closer . . . to that area in the Britt slough."[131] In fact, the Mount Vernon station is immediately north of Blackburn Road:

> Q. [R]ight north of Blackburn Road up the street just in the green area, it says Fire Station 1, do you see that?[132]
>
> A. Yes.
>
> Q. That's a Mount Vernon fire station, City of Mount Vernon?

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[128] *See generally Klamath County*, 201 Or.App. at 16 ("ODOT believes that the risk of delay to emergency vehicles by the extra distance and travel time is probably offset by the risk of delay at present from trains or switching movements blocking the crossing when emergency vehicles need to use it.").

[129] Harman, TR 922:19-24.

[130] Harman, TR 940:16-941:1.

[131] Harman, TR 933:10-14.

[132] *See* Exh. No. 27.

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A. Yes.

Q. And is that station -- how many trucks and how many emergency response vehicles do they have?

A. They man one engine per shift out of that station. They keep four or five other pieces of apparatus there. They have -- sometimes they will move different apparatus in there at different times for unknown reasons. So to answer your question, the response vehicle is a fire engine with two personnel on board.

Q. All right. And how about emergency medical treatment, what do they respond with?

A. They will respond with that engine, and they are both paramedics.

. . .

Q. And are they staffed 24 hours a day?

A. They are.[133]

Finally, Chief Harman testified that the fire district will either reconsider or rewrite their mutual aid agreements or "figure out an alternate way to improve response time" to "service the area to the level of service" that the residents "are receiving out in that area at this point."[134] Because of the district's mutual aid agreements and likely plan to rework those agreements to enhance response time, the effect of the Hickox closure on emergency response is not at all as the local population has been led to believe.

f. Whether a delay may occur in a particular instance is purely speculative.

59. *State ex rel. City of St. Joseph v. Pub. Serv. Comm'n* involved a petition to close a railroad crossing in Missouri.[135] Similar to the Hickox case, the St. Joseph's district fire station

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[133] Harman, TR 928:1-929:15; 930:6-7.

[134] Harman, TR 944:1-13.

[135] *St. Joseph*, 713 S.W.2d 593.

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was located east of the crossing at issue.[136] There was evidence that the industrial area west of the tracks had "a high potential for accidents requiring emergency equipment."[137] A fire official testified that "time is of the essence when emergency equipment responds to a fire, a chemical spill, and injury accident or to the report of a crime," and vehicles had to cross the tracks when an emergency call came from the district.[138] The opponents to closure argued that there was no evidence controverting these claims and that public convenience and necessity was shown to "suffer adversely" by the proposed crossing.[139]

60. Nevertheless, the court upheld the Commission's order to close the crossing.[140] Similar to this case, the evidence in St. Joseph showed that the crossing at issue was often blocked by standing or moving freight trains.[141] The court also emphasized that "[w]hether a delay may occur in any particular instance where an emergency is involved cannot be predicted except by speculation on the location of the emergency, the initial route chosen by the emergency vehicle operator, the point of departure and the prospect that one or more of the available crossings may be blocked by railroad traffic."[142] The same holds true here: opposing parties' claims of delay are purely speculative and depend on a range of variables, including but not limited to: (a) whether Mount Vernon (which typically) dispatches from the closest fire station to the affected area, Fire Station 1, under its mutual aid agreement; (b) the location of the emergency;

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[136] *St. Joseph*, 713 S.W.2d at 596.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* at 598.

[141] *Id.* at 597.

[142] *Id.*

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(c) the initial route chosen by fire district's responders; (c) the point of departure; and (d) the prospect that the Hickox crossing (if left open to public travel) would be blocked by a train when a responder arrives. It is a well-known legal axiom that, where evidence is required to prove an allegation, mere speculation is not enough.[143]

g. The fire hydrant immediately east of the Hickox crossing has never been used by the fire district; but could be accessed by a locked gate.

61. Chief Harman testified that a locked gate would "be fine" since access to the fire hydrant on the east side of the tracks would be available, although the district has never actually used the hydrant:

> Q. Now what is your thought about a locked gate and a private crossing as one of the potential solutions to this?
>
> A. A locked gate would be fine. If we had a significant structure fire in the area, we would need to leave that open for the duration of the incident, because . . . our major fire hydrant that we use . . . is at that intersection of Old 99 and Hickox.
>
> Q. How often do you make use of that particular hydrant?
>
> A. We have not used that particular hydrant.[144]

4. Farm Equipment And Trucks Will Likely Avoid The Hickox Crossing Even If Kept Open.

62. Farmer Jeffrey Boon's testimony shows that farm trucks will often have to take an alternate route ***even if the Hickox crossing remains open***:

> Q. Okay. Now I want you to assume that somebody comes out of your farm and takes a right and goes down, and as they approach the railroad tracks at the Hickox Road crossing that the gates come down and that that 3-axle rig or something is rolling up and the gates come down and sit there and stop and the lights are flashing and a big train rolls up and stops, what do

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[143] *See, e.g., Prentice, etc., Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 162-163, 106 P.2d 314 (1940) (A fact finder may not render a decision based on reasoning that "assumes a fact necessary ," but "concerning which assumed fact there is no evidence, and that employs suppositious fact as the basis for conjecture as to the possible cause of a particular physical result.").

[144] Harman, TR 942:14-943:4.

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you think you would tell your driver to do knowing that this thing could be sitting there for hours?

A. . . . I would probably have to tell him to try to turn the truck around and go around. . . .

Q. Okay. Would that be a problem with some of that equipment?

A Yes.

Q. All right.

A. Because it's not just 3, only 3-axle machines, we have some semis also.

Q. Okay. And that's not a terribly wide, wide road, and it's slightly elevated there as it gets close to the crossing, isn't it?

. . .

A. Yes.

. . .

Q. It would be problematic if that was an ongoing from an economic standpoint to have a driver sit there in your truck and wait hopefully for that train to move soon, wouldn't it?

. . .

A. Yes.

Q. So if I'm understanding you correctly, even if the crossing was left open, because of the possibility of blockage, economically you might have to plan to go around even if that was an option?

A. Yeah, I guess we would -- it would always have to be in the back of our mind because being so unpredictable.[145]

As Mr. Boon made clear, farmers in the area affected by closure will reroute due to delay and uncertainty caused by trains blocking the crossing. This further minimizes their need for the crossing to remain open.

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[145] Boon, TR 1111:21-1112:21; 1112:24-1113:10; 1115:1-7.

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5. Mount Vernon's Future Development Plan Should Not Be Considered.

63. The WUTC has determined that future public need, if any, should not be considered in determining whether to close a public crossing.[146] The *Ferndale* commissioners noted that "[w]here the legislature has considered future need to be a relevant consideration, that has been stated."[147] In addition, Skagit County or the City of Mount Vernon are always entitled to petition the WUTC to open a grade crossing in the future, should the public need for it arise.[148]

64. Even if future need for the Hickox crossing were a relevant consideration, the "likely future use of [an] at grade crossing is [nothing] more than speculative and highly uncertain."[149] The *Ferndale* commissioners also noted their concern that "[i]f this order were to consider future use of this crossing, . . . higher traffic volumes would have to be assumed. Higher traffic volumes would increase the danger. . . .".[150] The WUTC order does not need to decide the best plan for the City to follow – that is "uniquely the domain of the City government."[151] The WUTC's order should consider traffic flow options "only to the extent that they are relevant to the public need for the crossing."[152]

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[146] *Ferndale*, Docket No. TR-940330 at p. 9, *CONCLUSIONS OF LAW* ¶ 2 ("Only present public need should be considered in determining whether to close a crossing.").

[147] *Ferndale*, Docket No. TR-940330 at p. 9.; *see, e.g,* RCW 81.80.070 (directing Commission to consider the "present ***or future*** public convenience and necessity" in granting transportation carrier authority) (emphasis added).

[148] RCW 81.53.030.

[149] *Ferndale*, Docket No. TR-940330 at p. 8.

[150] *Id.* at p. 8 FN 2.

[151] *Id.*at page 6.

[152] *Id.*; *see also* p. 8 ("As noted above, the desire of the City to keep its options open for use of the crossing is not a present public need served by the crossing.")

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E. Suggested Alternative Warning Devices Are Inapplicable And Insufficient Given The Intended Use Of The Siding Track At The Hickox Crossing.

1. Neither Four-Quadrant Gates Nor Medians Are Sufficient Or Prevent Drivers From Ignoring Warning Devices.

65. A four-quadrant gate system involves "gates at a crossing sufficient to fully block highway traffic from entering the crossing when the gates are lowered, including at least one gate for each direction of traffic on each approach."[153] Medians are meant to deny "to the highway user the option of circumventing the approach lane gates by switching into the opposing (oncoming) traffic lane and driving around the lowered gates to cross the tracks."[154] Both devices have useful application, but neither is appropriate at Hickox.

66. The FRA recognizes that four-quadrant gates have a much lower "effectiveness rate" than crossing closure.[155] Because closure "prevents vehicle entrance onto the crossing, the probability of a collision with a train at the crossing is zero. . . . Effectiveness would therefore equal 1."[156] Four-quad gates with vehicle presence detection (as would otherwise likely be considered at Hickox due to the long semi-trailers and farm equipment using the crossing), have an effectiveness rating of 0.77: twenty-three percent (23%) less effective than closure.[157] A four-quadrant gate system without vehicle presence detection has an effectiveness rate that is eighteen percent (18%) lower than closure: 0.82.[158]

67. Although lack of a detection system creates problems of trapped vehicles, the FRA explains that four-quad gates with presence detection "have been assigned a lower

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[153] 49 C.F.R. § 222.59 *Appendix A to Part 222,* at (A)(2).

[154] *Id.* at (A)(3).

[155] *Id.* at (A)(2).

[156] *Id.* at (A)(1).

[157] *Id.* at (A)(2).

[158] *Id.*

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effectiveness rate because motorists may learn to delay the lowering of the exit gates by driving onto the opposing lane of traffic immediately after an opposing car has driven over the grade crossing. Since the presence detection will keep the exit gate raised, other motorists at the crossing who observe this scenario are frequently tempted to take advantage of the raised exit gate by driving around the lowered entrance gates, thus increasing the potential for a crossing collision."[159] Thus, the FRA confirms the ***unrebutted*** testimony of both BNSF and WUTC witnesses: four-quad gates do not prevent drivers from "beating the system." As railroad safety expert Mr. Peterson described:

> [T]here are still fools on the road. There are some who will either – who go around gates regardless or, in the case of four-quadrant gates, can exploit the capabilities of the system, specifically the fact that the entry gates come down first, the normal gates, if you will, and then the exits go down. And in many systems with . . . vehicle presence detection, they'll only go down once vehicles have actually exited the crossing, in an attempt to allow anyone who is on the crossing to exit. I mean, someone who really wants to can exploit the system and still go around the gates in that case.[160]

68. Similarly, medians have a lower effectiveness rating than crossing closure: the effectiveness rating of a non-traversable curb is 0.80, which is twenty percent (20%) less effective than closure.[161] Mr. MacDonald testified that medians are not fail-proof:

> Q. Okay, but the idea there is that generally as the motorists are sitting there waiting, they're unable to drive out into the left-hand lane and get around the gate?
>
> A. I would say they're discouraged.
>
> Q. Okay, but it's –
>
> A. Because most of the -- the only reason I say that is I have seen locations where the tire marks indicate someone did not want to sit there, so they did

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[159] 49 C.F.R. § 222.59 *Appendix A to Part 222,* at (A)(2).

[160] Peterson, TR 616:12-24.

[161] 49 C.F.R. § 222.59 *Appendix A to Part 222*, at (A)(3).

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> go over the top of the median that was provided. So again, it falls in the same category to discourage, not prevent.[162]

69. Even if both four-quadrant gates and a raised median are installed to deter drivers from trying to beat the "exit" gates, gate arms can be lifted manually. Mr. Zeinz testified, when asked whether four-quadrant gates "can . . . be moved or lifted manually?" that "[y]es, the motors that drive the gates, they don't actually hold the gates down, they hold them up."[163] He acknowledged that he is aware of drivers or their passengers propping up four-quadrant gates.[164] He was asked whether he would "expect that sort of behavior to occur if there was a long delay as opposed to just . . . an ordinary crossing like a single track crossing where . . . you wouldn't have any blocking, where you just have an approaching train?" Mr. Zeinz answered "Yes, there's been studies done on that, and I believe the studies I have seen show that when the driver has to wait more than typically about ***45 seconds*** is where the incidents of gate

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[162] MacDonald, TR 322:4-15.

[163] Zeinz, TR 1178:23-1179:1.

[164] Zeinz, TR 1180:1-3; 12-18.

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running start to increase."[165] It goes without saying that a wait of several hours is much, much longer than 45 seconds. The temptation to ignore warning devices would be extreme.

70. Other cases have also recognized that gates can be easily lifted. In 2007, the 10th Circuit heard the case *Beugler v. BNSF*, in which a Union Pacific conductor testified that he had lifted gates manually his "'whole life,' or at least during the entire span of his thirty-four year career with Union Pacific."[166] He "pegged the number of time he [had] manually lifted crossing gates at 'more than 100.'"[167] The conductor knew from experience that "the gates would be light enough for him to lift with one hand, even though he had to hold the gates with his arm fully extended above his head to allow traffic to proceed through the crossing."[168] Like the conductor in *Beugler*, any person with a mind to do so can easily lift a four-quadrant gate at Hickox to allow traffic to proceed through the crossing.

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[165] Zeinz, TR:1180:19-1190:3. Mr. Peterson also explained why lifting the gates is a concern in the Hickox setting:

> Q. It seems like the only thing you could do, sitting there thinking about it, is to just actually break a gate driving through; isn't that right? That's the only way to get through a four-quadrant gate, assuming there's not a large shoulder or something?
>
> A. Or start one gate up and get underneath it, which either of those things can be done if you're stationary at a two-quadrant crossing, or quite frankly, people run through the gate arms at two-quadrant crossings with pretty frequent regularity.
>
> Q. Okay. Well, go back to the part where you said get under the gate. What were you talking about there?
>
> A. If you had two people in the car, one person can -- those gates can be lifted up.
>
> Q. Oh, okay.
>
> A. And again, that's why I'm highlighting the difference between sealing it for immediate train movement versus a train sitting, in the case of a siding, potentially for many hours at one time.

Peterson, TR 619: 3-24.

[166] *Beugler v. BNSF*, 490 F.3d 1224, 1226 (10th Cir. 2007).

[167] *Id.* at 1226.

[168] *Id.*

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71. Moreover, since many of the concerned citizens have paid close attention to the proceedings and hearing process, those who attended Mr. Peterson's cross examination have heard affirmative testimony that the gates can be lifted. As Mr. Zeinz aptly testified, "a little bit of knowledge is dangerous. When people are familiar or think they're familiar with a situation, sometimes they make assumptions that in a situation they're not familiar with they might not be so inclined to make the same assumption."[169] The risk that the Hickox-area citizens familiar with the crossing and this proceeding will be tempted to lift the warning devices, knowing they are easy to lift, cannot be ignored.

2. Four-Quadrant Gates Were Not Designed Or Meant For Use At A Crossing In The Middle Of A Siding Track.

72. Mr. MacDonald, Mr. Peterson and Mr. Zeinz all testified that four-quadrant gates were not designed for crossings that will be blocked for long periods of time.[170] Mr. Peterson explained that:

> four-quadrant gates, in my opinion, and based on where I've seen them being installed in their relatively limited capacity thus far, is to help seal, if you will, higher speed corridors, where you're typically dealing with high-speed passenger trains. . . . You typically have the main track and a crossing coming across it and . . . you're going to have a relatively fast approach of a very fast train occupy the crossing, then depart. It is not, in my opinion, designed for situations where you're planning to have a siding and planning to have trains stationary for long periods of time. So to me, you're talking high-speed corridor, coming down to seal the crossing for a very quick train movement . . . and then coming up, versus trying to now seal up a different configuration, where we're going to have not only the mix of higher-speed passenger trains and slower freight trains, but also trains either moving very slowly in the siding or blocking the siding for longer periods of time.[171]

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[169] Zeinz, TR 1161:16-21.

[170] *See* MacDonald, TR 346:11-347:11; Peterson, TR 614:20-616:2; Zeinz, TR 1195:2-19.

[171] Peterson, TR 614:20-161:2.

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73. Mr. MacDonald's testimony supported Mr. Peterson's concerns, stating that the four quadrant gate system was designed to briefly "seal the crossing, not provide a long-term barricading solution for when a train is parked there."[172] He further testified that

> part of the justification [is that] the quiet zone rules have methods for night time closures, and they get into different specifics, and again that's the 49 CFR part 222, and it lists barricades and locking devices, but the 4-quadrant gates are not listed in that section of the rule, so they're meant -- my understanding, my belief, they're meant as an adjunct to the 2-quadrant gate system to address the gate run around or provide an additional level of deterrence but not function as essentially a closure device for a long period of time.[173]

74. Mr. Zeinz stated he was not familiar with any crossings with four-quadrant gates where trains frequently stop across the crossing for long periods of time.[174]

3. Median Barriers Are Inadvisable Here Where A Large Proportion Of Vehicles Using The Crossing Are Semi-Trucks, Trailers and Large Farm Equipment.

75. A median barrier is inappropriate where it would prevent large farm equipment and semi-trucks from using the crossing or turning around if necessary. Mr. Boon testified that his large farm equipment and trucks are wide and have maneuverability challenges.[175] Mr. Zeinz explained why median barriers are not practical at the Hickox crossing because of the wide, large farm trucks and equipment:

> Q. Can you explain . . . the difficulties with medians here?
>
> A. Well, I considered that as an option, one of the improvements that could be made at that crossing if the decision was made to leave it open. And my assessment is that yes, it's an option, but I don't think it's a very good one for a couple of reasons. And that is that where you have particularly large agricultural equipment, center medians or center curb with raised delineators or something like that could interfere with that type of equipment being able to get across the crossing. The other thing is we were

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[172] MacDonald, TR 346:23-347:1.

[173] MacDonald, TR:347:2-11.

[174] Zeinz, TR 1195:14-17.

[175] Boon, TR 1109:19-1110:1; 1112:14-21.

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> talking about this in the context of a crossing that could be blocked by a standing train very possibly for an extended period of time where a vehicle that's stopped at the crossing might decide to want to turn around and seek another route, and I felt that these raised medians or delineators would interfere with a vehicle's ability to turn around so that they could seek another route. . . . So that's why I tended to discount those type of supplemental devices as being terribly viable at this location.[176]

76. Mr. Peterson also concluded a median barrier "doesn't appear to be an option here because of the roadway design on Hickox."[177]

F. Issues Raised As Red Herrings That Do Not Support Opponents' Position.

1. The Design Of The Blackburn Crossing Is Irrelevant.

77. First and foremost, WUTC crossing inspection expert Mr. Johnston acknowledged that the Blackburn crossing meets all state safety standards for railroad crossings.[178] Further, as Mr. Norris' testimony and WSDOT's ***unrebutted*** Traffic Impact Analysis ("Analysis") make clear, there is no projected increase in traffic at the Blackburn crossing if the Hickox crossing be closed.[179] The Analysis shows that the Blackburn crossing will actually experience a slight ***decrease*** in peak traffic volume.[180] Mr. Zeinz provided a helpful illustration of this instinctively counterintuitive finding:

> There are some number of trips that originate let's say on Hickox Road west of the crossing that would cross the railroad at Hickox, go up Old Highway 99, and cross the railroad again at Blackburn to go into town. So you've got two places along the railroad that the same vehicle is crossing to get from somewhere to town. If Hickox were closed, then that vehicle would have to divert by way of Dike Road and Britt Road, and the net result is they could get where they want to go without having to

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[176] Zeinz, TR 1164-1166.

[177] Peterson, TR 618:2-4.

[178] Johnston, TR: 909:4-8.

[179] Exh. No. 13 p. 26. Neither the City nor County provided a traffic impact analysis refuting the WSDOT Analysis'conclusions that the majority of users will reroute to Stackpole. Neither the City nor County provided a traffic analysis showing that the Blackburn crossing or surrounding area will experience an increase in vehicular traffic.

[180] Exh. No. 13 p. 26.

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> cross the railroad at all. So not only in that instance is it safer at Hickox, but there's one less trip across the railroad at Blackburn. So I can understand how by closing Hickox the peak traffic count at the Blackburn crossing could in fact be less.[181]

Mr. Norris supported this point by testifying that "when you have something with an alternative, like closing Hickox Road, where those traffic volumes have to be shifted to other locations, then you have a shifting in all of the interactions between all other destinations such that the model achieves an equilibrium over it in terms of travel time."[182]

78. Mr. Norris ultimately made the most important point about traffic diversion. Because the AADT at Hickox is so much smaller than the AADT at the Blackburn crossing, Mr. Norris made it a point to give a "sense of the magnitude of what we're talking about":

> If all of the traffic that we're talking about on Hickox Road today, which is roughly 370 daily cars, were to divert to Blackburn Road, ***they would not even be detectable*** within the percentage of accuracy of the traffic count equipment that we use. So to make a big discussion about the impact here, ***its not going to be detectable.***[183]

79. Because there is no detectable impact on the Blackburn crossing, and the overall number of motorists using the Blackburn crossing will decrease, its design is irrelevant to the issues in this proceeding. Opposing parties' testimony and concern of increased use of Blackburn is unfounded and therefore immaterial to whether the Hickox crossing should be closed. The (again, ***unrebutted***) traffic analysis flatly undermines the arguments that use of Blackburn will increase, allegedly causing a reduction in overall public safety.

2. The Siding Track Is Not Part Of This Petition; Any Legal Effort To Locate It Elsewhere Is Preempted.

80. This matter concerns whether there are alternative means of public access if the Hickox crossing is closed, not whether the railroad has alternatives to constructing the siding track in

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[181] Zeinz, TR 1190:13-25; 1191:1.

[182] Norris, TR 784:19-24.

[183] Norris, TR 751:24-25; 752:1-7 (emphasis added).

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another location. The opposing parties have thus far failed or refused to acknowledge that any issue about relocating the siding track or shortening it is preempted by federal law.

81. Courts have consistently held that state and local statutes, regulations and ordinances which "involve railway matters do not survive ICCTA preemption challenges."[184] In *Maynard v. CSX Transp. Inc.*, plaintiffs argued that state law precluded CSX railroad from permitting a side track to be blocked by trains "for excessive time periods, sometimes in excess of six hours."[185] The court granted CSX's motion for summary judgment, explaining that "regulations of . . . train operations, as well as the construction and operation of . . . side tracks, [are] under the exclusive jurisdiction of the [Surface Transportation Board] unless some other provision in the ICCTA provides otherwise."[186] The court went on to point out that

> [b]ut-for the side track, a [freight] train . . . would have to stay on the mainline track, which would interfere with the movement of commerce. The side tracks allow the mainline track to be open for other rail travel, which enhances the movement of commerce on the rail lines. Because of their essential role, side tracks are a vital part of . . . railroad operations.[187]

The *Maynard* court concluded that because the plaintiff's blocking claims involved the construction and operation of side tracks, the claims were clearly preempted by the ICCTA.[188]

3. Any Argument That BNSF And/Or Amtrak Trains Cannot Block The Hickox Crossing For More Than Ten Minutes Is Also Preempted.

82. This issue is also preempted by the federal Interstate Commerce Commission Termination Act ("ICCTA").[189] However, this does not appear to be in dispute here, so there is

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[184] *Maynard v. CSX Transp. Inc.*, 360 F.Supp.2d 836, 840 (D.C. Ky. 2004).

[185] *Id.*at 838.

[186] *Id.*at 842 (quoting *Friburg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443-44 (5th Cir. 2001)).

[187] *Id.*

[188] *Id.*

[189] 49 U.S.C. § 10101, *et seq*; *see Maynard* at 842.

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no need to address this matter further. BNSF will provide additional briefing on this issue if requested by the Commission.

4. The Siding Track Will Not Be Used To Store Railcars.

83. Mr. Gordon and others testified regarding the intended use of the siding track, to allow long freight trains to pull off so that other trains can meet and pass.[190] BNSF does not intend to store railcars on the siding, let alone cars with hazardous material or fuel, so the public comments voicing concern about storage of tanker cars is unfounded and should not be factored into the public safety analysis.

5. Mr. Christianson's Private Crossing Is Not Involved.

84. At the public hearing, Mr. David Christianson expressed concern about his private crossing half a mile north of Hickox Road.[191] Since Mr. Christianson's crossing is not the subject of this petition, his claim about being potentially or allegedly landlocked is immaterial to the petition for closure, outside the scope of the Commission's review, and should be disregarded.

6. Decrease In Property Value, If Any, Is Not Within The Scope Of Review.

85. Some members of the public have contended that the closing of the Hickox crossing would affect their property values due to the fact that the properties would have less convenient access to the I-5 interstate highway. However, the WUTC "has no jurisdiction to consider damage to property as such."[192] The Commission may "only consider whether or not convenience and necessity justifies the closing of the crossing."[193] It would be convenient for

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[190] *See, e.g.,* Gordon, TR 719:3-721:1.

[191] Christianson, TR 413-415.

[192] *Snohomish County,* 35 Wn.2d 247at 255. The court noted that "[o]ther remedies may be provided by law to compensate owners for damage to property, if any."

[193] *Id.*

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some of the residents of rural Mount Vernon for this crossing to remain open. However, because of the viable alternate crossings, there is no necessity for it to remain open.

7. The Rural Fire District's Request For Funds For A Sleeper Program Is Not Justified By The Alleged Impact On The District's Emergency Response Times.

86. It is unreasonable to argue that any response time affect on an average of four emergency response calls per year justifies a $600,000 sleeper program. It should be rejected. First, as set forth in section D(3)(a), above, the increased response time calculations are not supported by the record. Second, the estimates provided by the district are speculative and reflect a wish list not unlike an "earmark" attached to legislation. Finally, this request is not reasonably related to the petition any more than Skagit County demanding BNSF replace its entire levy system.

8. The City Of Mount Vernon And Skagit County Can Petition The WUTC To Build An Overpass Or Underpass.

87. The City and County have voiced their concerns about flooding and emergency response since BNSF filed its initial petition. Under RCW 81.53.020, it is their prerogative to obtain WUTC authority to build an underpass or overpass across the tracks at Hickox Road.

G. Policy Considerations Favor Closure Of The Crossing.

88. In 1992, the Federal Highway Administration designated a high speed rail corridor between Eugene, Oregon and Vancouver, British Columbia.[194] Since 1993,

> Amtrak Cascades "service has grown substantially. . . . That year, less than 95,000 passengers rode Amtrak between Seattle and Portland. In 2006, approximately 630,000 riders traveled on Amtrak Cascades trains between Eugene, OR and Vancouver, B.C. Amtrak Cascades service frequently experiences sold out conditions on weekends, holidays and during the summer. Surveys of Amtrak Cascades passengers indicate that riders want more frequent rail passenger service.[195]

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[194] Exh. No. 10 p. vii.

[195] Schultz, Exh. No. 8 p.10:7-13.

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89. Because of the heightened demand and the siding's extended length, the frequency of both freight and passenger trains crossing Hickox will increase after the project is completed:

> Currently, only two to four trains use the Mt. Vernon siding per day (mostly Amtrak), because the shortened version does not accommodate BNSF trains that are too long to pull in. . . . The completed project will . . . have an immediate impact, as all BNSF freight trains and Amtrak trains will be able to use the siding track - up to 16 trains per day. The likely initial average will be at least 6-8 trains per day, and this is projected to increase as Amtrak and BNSF increase the number of trains on the route.[196]

The inescapable fact is that the Hickox crossing would become even more dangerous to motorists as the number of trains increase.

90. WSDOT has designated the Mount Vernon siding project as its highest priority for completion -- it will be completed sooner than all other siding construction or improvement projects in the state of Washington.[197] State policy supports the operation of the passenger rail service. In 1993, the state legislature directed WSDOT to "develop high quality inter-city passenger rail service" under RCW 47.79 to help "build a 'rail culture' in the region that would eventually make rail a competitive and viable alternative to automobile and regional air travel."[198] Today, freight and passenger rail service "is an important part of our state's transportation system," because

> [m]oving people and goods by rail is safer and friendlier to the environment than adding traffic to our already congested highways. Improvements to the state's rail system, whether funded by the private sector or the public sector, can help mitigate the impacts of our growing economy and population.[199]

In addition, as discussed above, public policy disfavors at-grade railroad crossings.

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[196] Gordon, Exh. No. 1 p.2:14-21.

[197] *See* Exh. No. 10 p. 5-30.

[198] Schultz, Exh. No. 8 p. 4:13-19.

[199] Exh. No. 10 p. vii.

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91. Closing the crossing is consistent with the policy contained in the Federal Railroad Association's Railroad-Highway Grade Crossing Handbook.[200] The Grade Crossing Handbook states that highway-rail grade crossings "should be considered for closure and vacated across the railroad right of way whenever one or more of the following apply:

> a. An engineering study determines a nearby crossing otherwise required to be improved . . . has acceptable alternative vehicular access. . . .
>
> . . .
>
> d. An engineering study determines the crossing should be closed to vehicular and pedestrian traffic when railroad operations will occupy or block the crossing for extended periods of time on a routine basis and it is determined that it is not physically or economically feasible to either construct a grade separation or shift the train operation to another location. Such locations would typically include:
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> . . .
>
> ii. Passing tracks primarily used for holding trains while waiting to meet or be passed by other trains.
>
> . . .
>
> vii. Locations where trains must stop or wait for crew changes.[201]

The Handbook also cites "[c]omplex crossings were it is difficult to provide adequate warning devices or that have severe operating problems, such as multiple tracks, extensive railroad-switching operations, or long periods of blocked crossings"[202] as factors considered in closure programs. The Hickox crossing will have each of these factors once the siding project is complete.

H. Recommendations.

92. BNSF respectfully requests and recommends that its petition to close the Hickox at-grade crossing be granted as follows:

93. 1. The Petition should be granted.

94. 2. Alternatively, if the Commission determines that flood fighting and evacuation

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[200] *See* Exh. No. 101.

[201] Exh. No. 101 at p. 150 (emphasis added).

[202] *Id.* at p. 81.

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efforts warrant emergency access by public authorities, then the petition should be granted such that the Hickox crossing will be closed to public. The crossing shall remain closed except as required for emergency access, ingress and evacuation as determined by the parties and enunciated in a private crossing agreement. Within 60 days of entry of a Final Order in this proceeding, BNSF, the City of Mount Vernon, Skagit County and Rural Fire District 3 shall enter into a private crossing agreement that emergency-access gates are to be installed at the Hickox crossing.

95. 3. The private crossing agreement, shall be entered into after a diagnostic team with representatives from the parties and WUTC determine whether/which existing gates and signage shall be removed when the crossing is converted to emergency access only. If the diagnostic team determines that said gates and signage shall be removed, the private crossing agreement shall determine which party will undertake the work and cost of removal.

96. 4. BNSF shall agree to mitigate the inconvenience to public travel by working with the City of Mount Vernon and Skagit County to construct a turnaround cul-de-sac west of the railroad tracks on Hickox Road.

97. 5. BNSF shall cause active warning devices to be installed at the Stackpole crossing before the Hickox crossing is closed to public use, consistent with the decision in this proceeding, by forming an agreement with Skagit County, or by petitioning the WUTC to change the existing signalization pursuant to RCW 81.53.261.

III. CONCLUSION

98. The Bourbonnais tragedy is an example of the worst kind of catastrophe that can occur if the Hickox Road crossing is left open to public travel. The crossing will be inherently dangerous because it will be located in the middle of a siding track with significantly increased train use and switching or passing operations. Trains will also block the crossing for several

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hours or more. These dangerous conditions and increased risk to public safety at the crossing far outweigh the public convenience and necessity. BNSF's petition to close the crossing should be granted because public safety compels it to be closed. BNSF and WSDOT recommend that the railroad and municipalities affected by closure agree to a private crossing with an emergency-access locked gate or gates. This will alleviate the local public concern about flooding and access in the event of a major flood event.

99. Every grade crossing closure involves some level of public inconvenience which in turn generates local opposition. Emotions run high when interested persons and parties opposing closure formulate their positions and mount oppositions. Ironically, at least in this case, that opposition purports to rely on public safety considerations and protecting individuals from potential future harm. However, this tribunal should not be seduced by the opposition's strategy. Speculation about potential emergency medical or fire responses in an area that averages four calls per year does not outweigh the risk of even one passenger train collision. Not one member of the public or an opposing party has even acknowledged the very real and significant danger of an open public crossing in the middle of a busy siding track. The safety risks of a 100-year, or even 25-year flood event do not compare to the risk of a catastrophic collision between a large truck and a passenger train. Neither have the opposing parties evaluated the impact of a passenger car and a freight train collision. As Mr. Zeinz so aptly put it, "it only takes one."[203]

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[203] Zeinz, TR 1221:8.

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DATED this 15th day of February, 2008.

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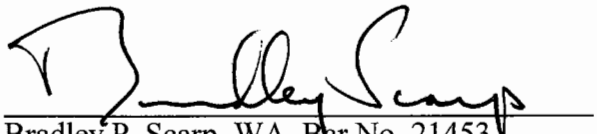

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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that the original and 12 copies of *BNSF's Post-Hearing Brief* has been sent by FedEx to Carole J. Washburn at WUTC and a PDF version sent by electronic mail. I also certify that true and complete copies have been sent via electronic mail and U.S. Mail to the following interested parties:

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I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 15th day of February, 2008 at Seattle, Washington.

Lisa Miller, Paralegal

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