

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY,

DOCKET TR-070696

Petitioner,

MOUNT VERNON, SKAGIT
COUNTY, WEST VALLEY
FARMS, AND FIRE PROECTION
DISTRICT NO. THREE’S POST
HEARING BRIEF

v.

CITY OF MOUNT VERNON,

Respondent

And

SKAGIT COUNTY , WASHINGTON
STATE DEPARTMENT OF
TRANSPORTATION, WEST VALLEY
FARMS LLC, and SKAGIT COUNTY,

Intervenors

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I. TABLE OF AUTHORITIES

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II. INTRODUCTION AND RELIEF REQUESTED

3 Respondent Mount Vernon, Intervenor Skagit County, West Valley Farms, and Fire Protection District 3, (hereafter referred to as “the Parties”) jointly submit the following Post Hearing brief to BNSF’s Petition to close an existing crossing located at Hickox Road and respectfully request that such Petition be denied. It has been made clear that Intervenor WSDOT’s and Petitioner BNSF’s evidence involving of public safety dangers of the crossing do not involve safety issues that currently exist at the crossing. Rather, Petitioner and Intervenor WSDOT rely on anecdotal evidence of the dangers that may come about from a proposed siding extension project which would, if constructed, add a new railroad line across Hickox Road next to the existing crossing and cause alleged greater dangers to public safety to the existing crossing should it remain open.

4 BNSF has made a fundamental error of law to petition for closure on such grounds. As will be shown, both RCW 81.53 et.seq. and Washington Caselaw interpreting this statutory framework clearly requires BNSF to petition the Commission under the framework set forth in RCW 81.53.020-RCW 81.53.050 *whenever* it desires to construct a new crossing. The Commission must then apply different authority and a different legal standard- a standard which precludes as a matter of law that the Commission order closure of an existing crossing. Examining such authority, it is clear that our State

Legislature did not delegate authority to the Commission the ability to order abandonment of an existing crossing whenever a new crossing is proposed such that the new dangers from such a proposal justify such closure. This error is fundamental in nature and must result in denying BNSF's petition to abandon or close the crossing located at Hickox Road.

5 Alternatively, should the Commission allow the petition for closure to proceed, a weighing of the evidence clearly shows that the foreseeable increased threats to public safety to those in the area that will result far outweigh the anecdotal, unempirical evidence provided by WSDOT and BNSF of gains to public safety. Moreover, because the crossing is currently relied on and used by the agricultural industry and will be needed to support future growth in the area, public convenience and necessity outweigh any small public safety advantages gained by such closure.

II. ANALYSIS

A. Petitioner has incorrectly filed a petition for closure in this matter. Whether closure is warranted is not relevant inquiry the Commission must conduct when a railroad proposes a new at-grade crossing.

1. The Commission must consider the proposed siding extension as a new crossing.

6 Pursuant to the rules of statutory construction words are given their plain meaning unless a contrary intent appears. In Re Estate of Little, 106 Wn.2d 269, 283, 721 P.2d 950 (1986). RCW 81.53.010 sets forth the definitions that control how to apply

RCW 81.53 et. seq. (the Railroad Crossings Act.) When discussing whether or not a line of track would be considered a “railroad” as the term is used, RCW 81.53.010 states unequivocally that the term “means every railroad, including...all bridges, ferries, tunnels, equipment, switches, spurs, *sidings*, tracks, stations and terminal facilities of every kind, used, operated, controlled, managed, or owned by or in connection therewith.” *Id.* (emphasis added.) Under the same statute, it goes on to define an at grade crossing to mean “*any point or place where a railroad crosses a highway or a highway crosses a railroad or one railroad crosses another, at a common grade.*” *Id.* (emphasis added.)

7 It is undisputed that the proposed siding project is to construct new rail line to cross over Hickox Road resulting in a new set of tracks which will be used primarily as a siding.¹ The definitions to be used in Chapter 53 Title 81 RCW are clear: at any point or place where a railroad crosses a highway at a common grade is to be considered a ‘grade crossing’ for the purposes of the chapter. Thus there can be no doubt for the purposes of RCW 81.53 et. seq., that the proposed siding project is a new ‘grade crossing’ over Hickox Road.

8 **2. BNSF is required to petition the Commission whenever it desires a new crossing pursuant to RCW 81.53.020- RCW 81.53.050 and must follow this statutory framework.**

9 An agency may act only as it is authorized to act by the legislature. Rettkowski v. Dep't of Ecology, 122 Wn. 2d. 219 , 226, 858 P.2d 232 (1993). And, the extent of the authorization depends upon the wording of the enabling statutes. Campbell v. Dep't of

¹ See Exhibit 8; Pre-Filed Direct Testimony of Jeffrey Schultz pg. 16, ln. 19-21
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Soc. & Health Servs., 150 Wn.2d 881, 894, 83 P.3d 999 (2004). Agencies may act if the action is either expressly authorized by the statute or impliedly authorized from the statutory delegation of authority. In re Impoundment of Chevrolet Truck , 148 Wn.2d 145 , 156, 60 P.3d 53 (2002). However, an agency's implied authority is limited to do those things that are necessary in order to carry out the statutory delegation of authority. Tuerk v. Dep't of Licensing , 123 Wn.2d 120, 125, 864 P.2d 1382 (1994).

10 The enabling statutes regarding new grade crossings are found within RCW 81.53.020- RCW 81.53.050. At the time a railroad company desires to cross a highway at grade (likewise a municipality or county who wish to cross a railroad line at grade) it must file a written petition with the Commission setting forth the reasons why the crossing cannot be made either above or below grade. RCW 81.53.030. This duty is mandatory. The statute uses the broadest possible language within its mandate suggesting that this must occur at the earliest possible moment:

Whenever a railroad company *desires* to cross a highway or railroad at grade, it *shall* file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade. *Whenever* the legislative authority of a county, or the municipal authorities of a city, or the state officers authorized to lay out and construct state roads, or the state parks and recreation commission, *desire* to extend a highway across a railroad at grade, they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. RCW 81.53.030 (emphasis added)

11 Once the written petition has been filed, the Commission then must engage in an inquiry separate an apart from the inquiry it considers petitions for closure of an existing

crossing. First, it must inquire whether or not “it is practicable to cross the railroad or highway either above or below grade.” *Id.* No order by the Commission granting or denying the crossing may be given granting such a crossing without this inquiry first being conducted:

12 All railroads and extensions of railroads hereafter constructed shall cross existing railroads and highways by passing either over or under the same, when practicable, and shall in no instance cross any railroad or highway at grade without authority first being obtained from the commission to do so. RCW 81.53.020

13 Second, in determining whether a separation of grades is practicable, the Commission must take into consideration: 1) the amount and character of travel on the railroad, 2) the amount and character of travel on the highway, 3) the grade and alignment of the railroad and the highway; 4) the cost of separating grades; 5) the topography of the country, and 6) all other circumstances and conditions naturally involved in such an inquiry. *Id.*

14 Third, if the Commission finds that it is impracticable to construct an over-crossing or under-crossing on the established or proposed highway, it may inquire into whether deflecting the established or proposed highway as practicable and feasible over-crossing or under-crossing or a safer grade crossing can be provided and can hold supplemental hearings on this issue. RCW 81.53.040. Moreover, the Commission may order a change in route of an existing highway if it finds and determines that a change in

route of an existing highway, or vacation of a portion thereof, is necessary or advisable.
RCW 81.53.050.

15

At the end of the inquiry, the Commission may the either: 1) find that it is practicable to cross the railroad or highway either above or below grade and so condition a crossing on such a project, 2) find that it is not practicable to cross the railroad or highway either above or below grade and enter a written order in the cause granting the right to construct a grade crossing at the point in question providing in the order such conditions that the railroad company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and its employees or 3) find that it is not practicable to cross the railroad or highway either above or below grade and enter a written order in the cause denying the right to construct a grade crossing at the point in question. *See* RCW 81.53.020 and RCW 81.53.030.

16

It is undisputed that WSDOT and BNSF desires to construct a new crossing along Hickox Road by constructing the siding project they have identified as the grounds for closure of the existing crossing. However, neither WSDOT nor BNSF, to the best of the Parties knowledge filed such a petition triggering the appropriate inquiry by the Commission. State law is unequivocal that this framework must be applied whenever a new at grade crossing is proposed. Petitioners forego such petition and misconstrue the required and necessary inquiry by seeking closure of an existing crossing based on the hazards created by the proposed new crossing.

17 **3. The Washington Supreme Court in Toppenish ruled that RCW 81.53.020-
RCW 81.53.050 is the exclusive manner in which the Commission may
provide relief to the Petitioner for a new crossing.**

18 Any argument made by BNSF or WSDOT that petitions for closure are permitted
on the grounds that RCW 81.53.060 provides an alternative framework for when new
grade crossing can be approved otherwise grade crossing proceedings can be approved
and later initiated for closure of that crossing has been soundly rejected by the
Washington State Supreme Court. The Court held that “the force of the plain mandatory
language” involving new crossings and that the statutes involving petitions for closure of
existing grade crossings are “so separate and apart from the proceedings for the
establishment of a crossing” that the framework which exists for petitions for new at
grade crossings are not to be impaired by RCW 81.53.060. State ex. rel. City of
Toppenish v. Public Service Commission, 114 Wash. 301, 309, 194 P. 982 (1921).
Because “...it is conceivable that the dangers of an existing crossing are, by actual
experience demonstrable with much more certainty than the prospective dangers of a
proposed crossing” the question of whether there should be a crossing should be decided
by the framework set forth within RCW 81.53.020- RCW 81,53.050. *Id.* at 309.

19 At the time of the ruling by the Supreme Court in Toppenish, the statute provided
that if the Commission finds it is not practicable to cross the highway either above or
below grade, it was required to file written order in the cause, granting the right and
privilege to construct a grade crossing. *Id.* at 309. Since the ruling in Toppenish, the
state legislature recognized the problems faced with the Commission’s limited authority

and expanded the Commission's authority to allow the Commission the ability to *deny* the right to construct a grade crossing at the point in question:

20 If it [the Commission] finds that it is not practicable to cross the railroad or highway either above or below grade, the commission shall enter a written order in the cause, either granting or *denying* the right to construct a grade crossing at the point in question. RCW 81.53.030 (emphasis added)

21 Most importantly, being aware that the Supreme Court in Toppenish recognized the distinction of the framework and inquiry to be had between petitions for closure of an existing crossing and petitions whenever a new crossing is proposed, the state legislature failed to include closure of the crossing as another remedy afforded to the Commission within RCW 81.83.030 when a petition for a new crossing is filed. It is impermissible to add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

22 The plain and unambiguous language found within RCW 81.56.060 limiting crossing closures and the analysis for such closures to *existing* conditions further supports the proposition that the Commission is not delegated the authority to consider closure when a new crossing is proposed:

The mayor and city council, or other governing body of any city or town, or the legislative authority of any county within which there exists any under-crossing, over-crossing, or grade crossing, or where any street or highway is proposed to be located or established across any railroad, or any railroad company whose road *is* crossed by any highway, may file with the commission their or its petition in writing, alleging that the public safety requires.... the closing or discontinuance of an *existing* highway crossing, and the diversion of travel thereon to another highway or crossing, or if not practicable, to change the crossing from grade or to

close and discontinue the crossing, the opening of an additional crossing for the partial diversion of travel, and praying that this relief may be ordered. RCW 81.53.060 (emphasis added).

4. Requiring Petitioner to file a new grade crossing petition is consistent with policy of RCW 81.53 that the party causing or bringing the harm should be responsible to mitigation.

23 Apportionment of cost was one of the purposes giving the department of public works (now UTC) jurisdiction over railroad crossings. State v. Department of Public Works of Washington, 155 Wash. 662, 286 P. 39 (1930). The primary objective of statutory construction is to carry out the intent of the legislative body by examining the language of the legislative enactment. State v. Smith, 80 Wn. App. 535, 910 P.2d 508 (1996); Stone v. Chelan County Sheriff's Dept., 110 Wn.2d 806, 809, 756 P.2d 736 (1988). All provisions must be considered in their relation to each other and if possible, harmonized to insure proper construction for each provision. Tommy P. v. Board of County Commissioners, 97 Wn.2d 385, 645 P.2d 697 (1982).

24 RCW 81.53.100 and RCW 81.53.130 require that whenever, under the provisions of the chapter, new railroads are constructed across existing highways, or highway changes are made either for the purpose of avoiding grade crossings on such new railroads, or for the purpose of crossing at a safer and more accessible point than otherwise available, the *entire* expense of crossing above or below the grade of the existing highway, or changing the route thereof shall be paid by the railroad company. By petitioning for closure rather than asking the Commission for a new crossing under RCW 81.53.020- RCW 81.53.050, BNSF and WSDOT avoid going through the analysis

required by the Commission to require BNSF or WSDOT to meet its burden that grade separation is not practical or that safety measures must be put into place unless the Commission deny the right to construct the siding. Rather, a petition for closure avoids this analysis, frustrates the appropriate apportionment of costs, shifts the burden on local jurisdiction who, in the future, would be placed on equal footing of having to pay for such costs under RCW 81.53.020- RCW 81.53.050 should the County or City petition to re-establish the crossing in the area. Such policy was recognized and expressed by UTC staff:

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

25

It would be inconsistent with the policies underlying RCW 81.53 to allow the railroad to first create an additional hazard (by extending a new set of tracks across a road), to assume no responsibility for minimizing that hazard (by, for example, installing more effective protective devices), and then use the unmitigated hazard as the reason to petition for closure of the crossing.²

² Ex. Pre-Filed Direct Testimony of Paul Curl pg 6-7
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As will be argued below, in the event of closure, this policy is further frustrated as the responsibility avoided by Petitioners is borne at the expense of causing adverse impacts to public safety caused by the closure and denying use of the crossing to the local public despite an immediate and foreseeable public necessity for the crossing.

B. BNSF has failed to meet its burden of proof that public safety requires the closing or discontinuance of the Hickox crossing.

27

The Parties believe the Commission is compelled to deny BNSF's Petition for closure as a matter of law for failure to comply with RCW 81.53.020-RCW 81.53.050 which sets forth the requirements whenever a new crossing is proposed. However, should the Commission proceed to evaluate the petition based on the prospective dangers of the proposed siding, BNSF fails to meet its burden that those prospective dangers that are avoided by closure outweigh the dangers which will result from closure of the crossing. As a threshold element, BNSF is required to show that "public safety requires . . . the closing or discontinuance of an existing highway crossing." RCW 81.53.060.

28

At best, it can be said of BNSF's case that in the event the crossing remains open, dangers may increase to the class of the public who recklessly, willfully or otherwise ignore the safety control devices increasing the danger of collision for those drivers and pedestrians.³ On the other hand, the Parties have provided evidence that closure increases several dangers to all citizens located both West and North of the crossing, including residents of downtown Mount Vernon and those children who attend a nearby

³ McIntyre, TR 663:1-25
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local school. Such dangers include: responding fire and medical emergencies, floods
levy breaches and flood evacuations, collisions at nearby (less safe) crossings, and
collisions with pedestrians and school children from diverted large commercial vehicles.

29 **1. BNSF evidence of the prospective danger to public safety is largely
anecdotal and testimonial evidence.**

30 Testimony from BNSF regarding the prospective dangers from keeping the
crossing open with the siding track consist largely of examples by their experts of drivers
who willfully or negligently disregard safety and warning devices. It is undisputed that
should the crossing remain open, the warning devices located at the crossing including
the lights, crossing arms, bells and gates would continue to function.⁴ However, BNSF
points to only in those instances in which the driver or pedestrian disregards those
devices as the dangers to public safety and that the siding track will increase the
likelihood of the event occurring.⁵

31 However, testimony from BNSF had failed to provide any empirical evidence on
the likelihood of such an event occurring or the increase of that likelihood. Rather, to
support that such a claim, BNSF provides one illustrative video hypothetical and one
example of a catastrophic collision occurring in Illinois occurring in 1999.⁶

It is widely accepted in the industry that as part of basing an assessment on the
closure of a railway crossing that there must be an examination of empirical data
including collision or accident history data and other empirical data:

⁴ Ex. 2 Pre-Filed Direct Testimony of Megan McIntyre 5:1-5

⁵ *Id.* at 6:1-11; See Ex. 7 Pre-Filed Direct Testimony of Daniel MacDonald 3:7-11; Exhibit 5 Pre-Filed
Direct Testimony of Foster Peterson 4:7-25; McIntyre TR 663:1-25

32 A systematic method for identifying problem locations is most important. For highway-railroad grade crossings, two types of information are needed: inventory and collision data. Inventory data include the location of the crossing, volumes of highway and train traffic over the crossing, and physical elements of the crossing. Collision data for each crossing are also needed.⁷

33 Such data is then commonly employed to create both hazard indices and accident prediction modeling in which to evaluate the relative dangers of the crossing to public safety.⁸ In terms of likelihood of a collision “A prediction model is intended to predict, in absolute terms, the likelihood of a collision occurring over a given period of time given conditions at the crossing.”⁹ Despite these common and well recognized tools to base an opinion of safety of a railway crossing, none of BNSF witnesses relied on such tools in forming their opinions.¹⁰

34 Examining such statistical information and modeling illustrates that the likelihood of such a collision is rare and that the relative safety of Hickox Railway crossing far surpasses other crossings in the area. Looking at the DOT’s accident prediction model for crossings county-wide, the Hickox Railway crossing received a ranking of 49th out of 80 crossings in evaluating the likelihood of a collision occurring at the crossing.¹¹ In other words, the crossing was placed in the near the bottom 25% of crossings county-wide for lowest collision prediction value. In contrast, the accident prediction value of

⁶ Ex. 4 Still Frames from BNSF Video; Ex 145 NTSB Railroad Accident Report from Bourbonnais, Illinois

⁷ Ex. 101 DOT FRA Railroad-Highway Crossing Handbook pg. 47.

⁸ Id. pg. 54-55

⁹ Id. pg. 55.

¹⁰ MacDonald TR, 302-303, Peterson TR, 549-550, McIntyre TR, 655-656; Gordon TR, 695

¹¹ Ex. 102 DOT FRA Accident Prediction Report

the Blackburn crossing immediately North and the Stackpole crossing immediately South of Hickox where traffic will most likely be diverted received lowly rankings 17 and 14 respectively.¹² Looking specifically at the Hickox Railway crossings accident history, there are a total of two reported vehicle/train accidents at the BNSF/Hickox Road railway crossing since 1975 which calculates to less than the average accident rate at railway crossings of 0.1 accidents per year.”¹³ Looking at the likelihood of the human factor (i.e. drivers and pedestrians who ignore safety devices) as a cause of collisions only one accident since 1998 has been attributed to such a factor.¹⁴

35 Failure of BNSF witnesses to base their opinions beyond that of anecdotal or hypothetical examples of events results in a failure to meet their burden that public safety requires closure of the crossing. Hypothetical examples or individual cases do not provide evidence before the Commission of the likelihood that crossing collisions as described by BNSF, caused by recalcitrant drivers and pedestrians, will occur. On the contrary, the empirical evidence presented by the Parties of accident history to the crossing and accident history county-wide illustrate such occurrences are rare and more likely to occur at the crossings North and South of Hickox.

36 **2. Closure of the Crossing will result in significant increases of danger to flooding in the area.**

¹² Id. BNSF has pointed to a singular improvement made to Blackburn not recognized in the modeling to suggest that the ranking should not be relied on. However, BNSF fails to meet its burden to provide any evidence that the singular improvement will create an accident prediction value higher than that of the Hickox Railway crossing and improvements are but one of multiple factors employed in the model.

¹³ Ex. 13 Hickox Road Study pg. 21.

¹⁴ Ex. 103 DOT FRA Summary of Accident Information for Skagit County
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The dangers caused by flooding include, loss of life (potentially resulting in mass casualties), extensive property damage, the spread of disease, and the expenditure of large amount of resources by local jurisdictions on emergency operations.¹⁵ Use of the crossing by the public and local jurisdictions is critical in aiding efforts to protect the public from the dangers of flooding. The Hickox Railway crossing is located at the southern jurisdiction boundary line of the City of Mount Vernon.¹⁶ Hickox Road is a two lane road running East-West extending Westerly to and intersecting with Dike Road. Dike Road abuts levees protecting against overflowing of the Skagit River. Landward of the levees and between the crossing, or West of the crossing, lie property that is part of the City's 100 year flood plain.¹⁷ Immediately East of the Crossing is the Interstate Five corridor, high ground, and the Meridian Quarry used as source materials for levee repairs and flood operations.¹⁸ To the North is downtown Mount Vernon which also resides in the floodplain and abuts the Skagit River.

Flooding is the greatest threat in the area and the likelihood that significant flooding will occur is certain.

The threat of flooding is the greatest hazard to the general public and welfare within the region and is a constant seasonal threat to those who reside in the floodplain.

¹⁵ Ex. 23 Pre-Filed Direct of Glenn Brautaset pg 3; ln. 1-30

¹⁶ Ex. 33 PreFiled Direct Testimony of Jana Hanson 6:2

¹⁷ Ex. 16 Prefiled Direct Testimony of Albert Liou 5:6-30

¹⁸ Ex. No. 23 Brautaset 6:21-29

It is inevitable that the public will face the threat of a significant flood event in the future.¹⁹

39 It is estimated that during a 100 year flood event, waters will reach up to nine feet in depth in the surrounding area, five to seven feet in a 50 year event and upwards to three feet in a less significant event.²⁰

40 Since 1975 flooding has occurred on an average of once every two (2) years in Skagit County, with thirty-five (35) major recorded flood events since 1815.²¹ Severe flooding has occurred in the past in the vicinity of Hickox Road, and could occur in the future in any given flood season.²² If a failure occurs within levees west of the crossing, water would reach the Hickox Railroad crossing within 10 to 20 minutes. This is the amount of time one could have to reach high ground.²³

41 The Hickox Road crossing (and virtually all properties in the area), are located within the 100 year floodplain (as identified by FEMA).²⁴ The flooding of February, 1951 was only a twenty-five (25) year flood event, and completely inundated the entire Hickox Road area.²⁵ In addition to the 1951 flooding, three (3) major dike failures occurred in the Hickox road area in 1921.²⁶

Keeping the Hickox Road Crossing open is of critical importance to protect the public from flood dangers.

¹⁹ Ex. No. 16 Liou 4:1-3. Ex. 23 Brautaset 3:12.

²⁰ Ex. No. 16 Liou 6:18-23

²¹ Ex. No. 36 Watkinson p. 2-3.

²² Id; Ex. No. 41 Pre-Filed Direct Testimony of Ric Boge p. 4

²³ Ex. No. 16 Liou 7:12-14

²⁴ Ex. No. 41 Boge p.4

²⁵ Boge TR, 1078-1079; Boge TR, 1080-1081.

²⁶ Ex. No. 41 Boge p.3

42

The Hickox Road crossing is of particular importance as a flood evacuation route, and also as a means to provide access for local flood-fighting activities.²⁷ The crossing was known to have been used for flood fighting in at least two (2) recent flood events in 1990 and 2003.²⁸ The crossing also provides the most direct and proximate route to the Meridian Quarry and high-ground, located to the east of the crossing.²⁹ Strategically, maintaining the integrity of the dike system serves as the lynchpin to minimize flooding consequences.³⁰

43

In the event of major flooding in the area, the Hickox Railway crossing would also be particularly important because other access routes used for flood fighting and/or evacuation could be blocked or impaired by flood water, equipment, and/or materials.³¹ Creating an even greater demand upon use of the crossing, if a levee failure occurs at the north side of the City, water will flow down south generally following the railroad tracks through the Cameron Way underpass of I-5, spreading into the downtown (Old Town) low-lying area, and continuing south on both sides of the railroad tracks to Hickox Road.³² Because of this hydrology, the Hickox Railway crossing serves as a possible primary evacuation from those residing in Mount Vernon's Old Town area as well as a primary route for supplies and materials.³³ The potential of having to evacuate the

²⁷ Ex. No. 35 Watkinson p. 4-5

²⁸ Ex. No. 41 Boge p. 3.

²⁹ Ex. No. 35 Watkinson p. 5.

³⁰ Ex. No. 16 Liou 7:18-19

³¹ Ex. No. 35 Watkinson p. 4-5; Watkinson TR:1063-1064.

³² Ex. No. 16. Liou 5:19-22.

³³ Ex. No. 23 Brautaset 9:10-30 and 10:1-30

public from Mount Vernon's Old Town is greater than any other potential evacuation quadrant within the City as flood protection provided in the area relies heavily on raising the levy through flood fight operations including mobilizing volunteers and sandbagging.³⁴ A high density area, evacuation of the quadrant would include; a high senior population, a mental health facility, a jail, and several residences with non-ambulatory citizens. This evacuation would entail busses, more responders, more time, and possibly assistance from National Guard.³⁵

44 The likelihood of having to evacuate the Old Town Quadrant to escape flooding is certain.³⁶ In other words it is not a question of 'if' but a question of 'when.'³⁷ As recently as 2006, the City was in the position of having planning for such an evacuation and luckily avoided this by the narrowest of margins due to a storm cell shift of a few degrees.³⁸

45 **Mitigation**

46 As argued previously, it is the Parties position that because Petitioner is creating the hazard caused by the proposed new crossing, Petitioner must first show why it is not practical to construct grade separation at the site (an improvement which if completed would effectively bring this matter to a close) and if not practical whether other safety measures will be adequate otherwise the Commission must *deny* the right to construct the proposed siding. Short of keeping the crossing open with the appropriate safety

³⁴ Ex. No. 23, Brautaset 9:12-22.

³⁵ Ex. No. 23, Brautaset 11:1-6.

³⁶ Ex. No. 23, Brautaset 9:1-30.

³⁷ *Id.*

improvements, providing for grade separation or providing 100 year flood protection to the levy's protecting the area and the area North, mitigating the adverse impacts to flooding risks are unavailable.

47 Closing the crossing, securing it with locked gates and keeping a license for access of the crossing to essential parties will not provide sufficient mitigation. It is foreseeable that flooding will occur in the area with little advance notice or warning (regardless of whether the river was at flood stage), and may not allow enough time for a locked gate to be opened to allow for flood evacuation.³⁹ Failure of a levy would result in the public having only minutes to reach high ground. Given that the public may only have minutes to reach high ground to avoid flood waters, it is clear locked gates are not a satisfactory solution as any time delay would be significant, add additional chaos, and create unnecessary demand on emergency personnel.⁴⁰ The public cannot and should not rely on potential evacuation routes that are barred as it may generate a false reliance on an evacuation route that is not available.⁴¹ As with a fire evacuation route in a building, emergency evacuation routes outside the floodplain are effective only when maintained as consistently open.⁴²

48 Emergency plans depend on warnings systems which are effective only if evacuation routes are consistently maintained. Moreover, locked gates create a potential

³⁸ *Id.*

³⁹ Ex. No. 35 Watkinson p.3-4; Boge TR: 1076-1078; Watkinson TR, 1065-1066

⁴⁰ Brautaset, TR, 992:17-18

⁴¹ Brautaset TR, 992:18-22

⁴² Brautaset TR, 992:1-10

that citizens may take it upon themselves to unlock or dismantle the gates in order to flee rushing flood waters which will cause a number of its own hazards.

49 In light of the forgoing flood concerns alone, the evidence illustrates critical public need for the crossing to remain open, and that closure of the crossing would not promote or serve the interest of public safety. However, as will be discussed below, closure of the crossing will have additional impacts to public safety beyond flood concerns.

50 **3. Closure of the Crossing will result in significant adverse impacts to provisions of emergency services in the area.**

51 Skagit County Fire Protection District No. 3 is responsible for providing fire protection and emergency medical services to the residences, businesses, farms and visitors in the area that would be directly affected⁴³ by a closure of the Hickox Road crossing. Closure of the Hickox Road crossing will substantially increase the danger to public safety as the closing will have a direct and undisputed negative impact on the ability of local emergency response providers to maintain the current level of service to the area directly affected by the closure. In this situation, the impact on public safety created by the closing is not justified by the economic “cost saving” rationale advanced for closing the crossing.

52 Skagit County Fire Protection District No. 3 is an all-volunteer fire district whose volunteers respond out of two stations, Cedardale and Conway to provide fire suppression and emergency medical services to residents and visitors in the area most

directly affected by the proposed Hickox Road crossing closing.⁴⁴ A grade closing will have a negative impact on the District's ability to provide fire protection and emergency medical services in a manner consistent with local, state and national response time standards, which will directly jeopardize the health and safety of the citizens residing, working or visiting the area affected by the closure.⁴⁵

53 **Closing of the crossing will impact response times.**

54 The evidence submitted by the Fire District and by Gary Norris, the WSDOT consultant demonstrates that the closing of the crossing will result, on average, in a 2-7 minute delay in the time it takes a first responder to arrive at the scene of a fire or emergency medical incident in the area affected by the closure.⁴⁶

55 The above response time estimates are based on drive time data.⁴⁷ The actual impact of the crossing closing will likely be greater based on the fact that the lower range of estimated impacts on response times was derived from drive time responses coming from the Conway station.⁴⁸ The Conway response times drive times will likely be greater because of an increase in farm machinery traffic on Dike Road and Stackpole Road⁴⁹ and by the District's plans to relocate the Conway Station out of the flood plain.⁵⁰

⁴³ References to the "area directly affected" by the proposed closure includes the area west of the railroad tracks, north of Stackpole Road and South of the Mount Vernon City Limits. Harman, TR. 920:22 – 921:3.

⁴⁴Ex. No. 85, Harman, 6:2

⁴⁵ Ex. No. 85 Harman, 15:10; Ex. No. 88, Rabel 19:17.

⁴⁶ Ex. No. 11 Norris, 24 ; Ex. No. 85 Harman 10:3-12:14, Ex. No. 86 Response Time Summary.

⁴⁷Response Time Summary, Exh. No. 86, Rabel, TR. 384:19-385:4.

⁴⁸Harman, Exh. No. 85, 11:9, 19, Response Time Summary, Exh. No. 86.

⁴⁹Harman, Exh. No. 85, 12:18-13:2; Rabel, TR. 1387:10.

⁵⁰Benson, Exh. No. 87, 3:23-4:9.

56

If the Hickox road crossing is closed, farm and trucking equipment that normally uses the Hickox road crossing will be diverted in part to Dike road.⁵¹ The presence of increased farming and trucking traffic on Dike Road will directly interfere with responses from the Conway Station.⁵² The District's plan to relocate the Conway Station out of the flood plain will also increase the response time impacts caused by a closing of the Hickox Road crossing. This is because the only suitable locations out of the flood plain are to the east of the current station and even further away from the area most directly impacted by the proposed closing.⁵³ Any argument that responses from the Conway station offset the direct impacts of the closing also ignores the importance of the District providing an effective response force which will require a timely response of units from both the Cedardale and the Conway stations.⁵⁴

57

Neither WSDOT, nor BNSF submitted any evidence that response times would not be affected in the manner established by the fire district and WSDOT's own witness. While BNSF questioned whether the availability of mutual aid would minimize the response time impact, the only testimony admitted establishes that mutual aid is not always available and is not a substitute for a fire district response.⁵⁵ BNSF also attempted to downplay the significance of the response time impact by noting that only 12 calls occurred over the prior three years. The Commission however is required to promote public safety. *Department of Transportation v. Snohomish County*, 35 Wash. 2d 247, 250,

⁵¹Ex. No. 85, Harman, 12:18-13:2.

⁵²Ex. No. 85 Harman 12:18-13:2; Rabel, TR. 1387:10.

⁵³ Benson, TR. 962:16-964:8.

⁵⁴ Rabel, TR. 382:20-383:8, 385:13.

212 P.2d 829 (1949) (the “whole purpose” of chapter 81.53 RCW “is to promote the public safety.”) Although the record reflects only twelve recorded calls over the prior three years, the District’s expert established that on average the area would generate twenty-two calls.⁵⁶ Ultimately, whether there is one, twelve or twenty-two fires or major emergency medical responses in the affected area, the impact on public safety for the residents living and owning property in the area is undisputed and the loss of even one life or one home to a fire is one too many.

58 For every minute of delay in response times caused by the closing, the residents and visitors in the areas will experience a 7-10 % reduction in their chance for survival in the event of a cardiac arrest.⁵⁷ Just considering the undisputed drive time response impact of 2-7 minutes the closure would reduce the chances of survival for a cardiac arrest victim 14-70%. This is a significant negative impact on public safety that cannot be justified by the economic rationales set forth by BNSF and WSDOT in support of the petition to close the crossing.

59 A similar impact will result from the delayed response times for fire suppression. Fires will at least double in size as each minute passes.⁵⁸ As Captain Rabel testified, “the fact that Hickox Crossing closure will increase drive times by 2 to 4 minutes means that fires they respond to have the potential to be 4 to 16 times larger than they would have

⁵⁵ Harman, TR. 940:16-941:1; Ex. No. 85 Harman 13:21-14:2.

⁵⁶ Ex. No. 88 Rabel, 17:8-18:19; Rabel, TR. 370:12.

⁵⁷ Ex. No. 88 Rabel, 12:9.

⁵⁸ Ex. No. 88 Rabel 13:12.

been with the crossing still open.”⁵⁹ To place this in human terms, larger fires will result in increased risk to residents, workers, fire fighters, particularly volunteer firefighters and will result in greater property damage and financial loss.⁶⁰ The impacts of the closure on fire protection will also be increased because of the difficulty in providing water in sufficient amounts to fill the water tenders used by the fire district to fight fires in this area. The closure will block access to the high volume hydrant located east of the Hickox road crossing and will result in substantially longer drive times to refill tenders.⁶¹ This combination of delayed response times and reduced access to water creates an unacceptable risk to public safety.

60 **Mitigation.**

61 The District recognizes that given its limited resources it already has difficulty in achieving adequate response times in this area.⁶² The District’s response times are a factor of three basic variables, dispatch time, volunteer mobilization and driving time.⁶³ The District has little control over dispatch time while the crossing closing will increase the mobilization and drive times. Accordingly, the only available option in the event the crossing is closed, without construction of a new access route, will be mitigating the volunteer mobilization times. The District is working toward improving its response times and is in the process of developing a sleeper program to improve response times.⁶⁴

⁵⁹Ex. No. 88 Rabel 13:13.

⁶⁰Ex. No. 88 Rabel 13:17; Rabel TR. 385:15.

⁶¹Ex. No. 88 Rabel, 14:19-15:19; Harman, TR. 942:23-943:10.

⁶²Ex. No. 88 Rabel ,19:17;.

⁶³Ex. No. 88Rabel, 8:9-9:18; Harman TR. 944:18-946:18.

⁶⁴Ex. No. 85 Harman, 15:19-16:9; Benson, TR. 961:21; 965:8.

In the event Petitioners are allowed to close the crossing and even in the event the petitioners are required to keep the crossing open but are permitted to block the crossing for extended periods, the Fire District requests that BNSF be required to mitigate the driving time impacts by supporting the District's planned volunteer sleeper program. A sleeper program would place volunteers at the station and would dramatically reduce the volunteer mobilization time in a manner that would offset the drive time impacts.⁶⁵ Based on the District's initial estimates, the District will need to incur capital expenses in excess of \$600,000 to improve its station facilities to accommodate a sleeper program.⁶⁶

62 **4. Closure will result in increased risk of collision diverting traffic**
63 **to less safe alternate crossings, less safe roadways, and school routes.**

63 Nothing in the evidence presented in support of the petition shows that any fewer vehicles would cross the railroad tracks between Conway and Kincaid Street in Mount Vernon. Rather, the argument is advanced that there are not enough vehicles using Hickox Road to cause a degraded level of service at the intersection alternatives which are available⁶⁷. The Parties ask the Commission to consider the safety impact of diverted traffic to the alternative crossings. If the deficiencies in road design at the Interstate 5 Hickox Road overpass are not mitigated then traffic is diverted to the Blackburn Road resulting in several adverse public safety consequences. First, the diverted traffic will include farm equipment, trucks and other traffic which do not mix safely with the Mount

⁶⁵Harman TR. 945:10-946:14; Ex. 88 Rabel, 20:11.

⁶⁶Ex. No. 85, Harman, 16:5; Benson TR. 965:8; Benson, TR. 968:14-969:12.

⁶⁷ Ex. No. 13 and 15, TR _____

Vernon Christian School or the pedestrians on Blackburn and at the Blackburn Road intersection with Old Highway 99⁶⁸ ⁶⁹. Second, the mismatch between the farm vehicles and the urban traffic typical of South Second Street, Old Highway 99 reduce the safety of the farm and agricultural vehicles as well as the traveling public in ordinary automobiles. If, as the Parties contend, the points to which diverted traffic will go increase the risk to the public it is the obligation of the Commission to keep the Hickox Road railroad crossing open and prevent the more hazard prone route from being used by the traffic which can and will safely use the Hickox Road grade crossing even with a siding.

64

The diverted traffic has been shown by the testimony of several members of the public, including Brian Waltner⁷⁰, Richard Smith⁷¹, Darrin Morrison⁷², John DeVlieger⁷³ to put a greater burden on the Dike Road. The Dike Road is a narrow, winding, sloped road which has sharp curves and blind corners. Public safety is increased when the traffic volume on Dike Road is minimized. Ironically, the Washington State Department of Transportation and Burlington Northern Santa Fe contend that it is safer to prevent traffic from taking the most direct route to Interstate 5 and from Interstate 5 in south Mount Vernon. Diverted traffic will use Dike Road. It will not avoid crossing the railroad track. Virtually all types of diverted traffic will ultimately use an at grade crossing at a point no

⁶⁸ Ex. No. 79 and 82, Patrick Dejong, Prefiled Testimony and Photos

⁶⁹ Ex. No. 201, Michael Comacho, Public Testimony

⁷⁰ Ex. No. 201, Brian Waltner Public Testimony

⁷¹ Ex. No. 77 and 78, Richard Smith, Prefiled Testimony and Map

⁷² Ex. No. 84, Darrin Morrison, Prefiled Testimony

⁷³ Ex. No. 83, John DeVlieger, Prefiled Testimony

more safe than the Hickox Road grade crossing and after traveling at least one mile north or south to reach that alternative railroad crossing.

65 BNSF offered no evidence that closing the grade crossing would improve public safety in the event of Skagit River flooding in the area when compared to leaving the crossing open. There is abundant evidence of past use of Hickox Road in flood fighting from commissioners of Skagit County Diking District No. 3 current chairman, David Olson, and past commissioner, Richard H. Smith, among others. Nothing in the BNSF testimony showed that keeping the crossing open would harm the public interest when catastrophic flooding occurs between the left bank of the Skagit River and the Burlington Northern Santa Fe Railroad tracks.

66 The evidence shows that in order for homeowners, Pedroza, Youngsman and Vander Pol⁷⁴ to escape in the event of a flood after closing the Hickox Road crossing that it would be necessary to pass through a low point in the Hickox Road, reach the Dike Road and then travel on Dike Road on the very toe of the levee along the Skagit River which is projected to fail. Testimony also shows that the Dike Road in the time of flood emergency is devoted to flood fighting by heavy equipment hauling rock and sand bags and people engaged in sandbagging. It would reduce the hazard in the event of flooding to have Hickox Road open as a regular crossing. The prefiled testimony of Richard H. Smith⁷⁵, David Olson⁷⁶, Jeff Boon⁷⁷ and David Boon⁷⁸ corroborate this conclusion.

⁷⁴ Exh. 201, Pedroza, Youngsman, and Vander Pol, Public Testimony, January 7

⁷⁵ Exh. 77 and 78, Richard Smith, Prefiled Testimony and Map

⁷⁶ Exh. _____, David Olson

⁷⁷ Exh. 71, 72, 73, and 74, Jeff Boon, Prefiled Testimony, Map, Map, and Photos

67

The evidence submitted by BNSF concerning driver behavior portrays willful acts of foolish drivers. If such drivers are subjected to the stress of flood evacuation or delays caused by large farm equipment traveling extra miles on narrow roads because they can not cross the Hickox Road crossing, Burlington Northern expects these devil drivers to become angels. If the danger posed by BNSF at the railroad tracks does exist, then that danger would be multiplied on the county roads which provide the alternative to Hickox Road as a means of crossing the railroad tracks and reaching Interstate 5. For example, consider how John DeVlieger and John Van Pelt go to the Skagit County Fire District No. 3 fire hall to initiate emergency response. Or consider how physicians, Sloan Winkes, MD⁷⁹ and Ben Winkes, MD⁸⁰ must go to the hospital for delivery of babies and other medical emergencies by a longer and less safe route if there is no Hickox Road grade crossing.

68

5. BNSF and WSDOT employee experts have exhibited bias as their employers will substantially benefit from closure.

69

Economic costs and operational impacts are not relevant to the issue of closure or what mitigation of impacts to public safety should be required. However it is clear that these issues serve as a primary role for the BNSF and WSDOT seeking a closure alternative. Expert opinion from both BNSF and WSDOT officials that closure of the crossing is preferred alternative under a public safety standard must be examined in light

⁷⁸ Exh. 67 and 70, David Boon, Prefiled Testimony and Photos

⁷⁹ Exh. 75 and 76, Sloan Winkes, MD, Prefiled Testimony

⁸⁰ Exh. 76, Ben Winkes, MD, Prefiled Testimony, Letter dated May 28, 2007, Exh. 202, Public Testimony

of the bias in regards to the economic benefits and operational efficiencies each party has identified in the event such closure was permitted.

70 **The underfunding of the capital improvement project limited WSDOT's alternatives.**

71 Because both WSDOT and BNSF would benefit from the siding project, an agreement was struck previous to the Petition for closure to extend the siding project with the understanding that funding for the project was limited.⁸¹ Such funding for the project was limited by the state legislative appropriations in the amount of 2.5 million dollars.⁸² As a result of the limited budget and delay in completing the siding project, relocation of the siding was not deemed an appropriate alternative.⁸³ The more costly grade separation option Hickox over the railroad was not considered in WSDOT's Road Study.⁸⁴

72 **BNSF will stand to benefit if the project is completed and closure occurs.**

73 Creation of the siding project will allow BNSF railway freights trains to use the siding throughout the day, improve freight mobility and overall rail line capacity.⁸⁵ Currently, the siding cannot be utilized by BNSF trains due to it length.⁸⁶ However, BNSF trains are expected to immediately utilize this siding upon completion of the project and this use is expected to increase.⁸⁷ Operationally, BNSF has testified to problems in achieving maximum gains from the project should the crossing remain open

⁸¹ Ex. No. 8 Schultz,13:17-23

⁸² Id. 14:8-13.

⁸³ Id. 15:23-25, 16: 6-9; Schultz TR 481:8-18

⁸⁴ Ex. No. 13 Hickox Road Study.

⁸⁵ Ex. No. 8 Schultz. 13:10-13.

⁸⁶ Ex. No. 1 Gordon 2:14-21

⁸⁷ *Id.*

at grade.⁸⁸ These non-safety related concerns influencing expert testimony is best exhibited by Mr. MacDonald (project manager for BNSF) who, when responding the question of whether, in his opinion, current safety improvements to the railway crossing were adequate in the event the siding is constructed showed an inability in distinguishing his own opinion from that of his employer:

We believe the crossing should be closed, therefore I will make the next step there to say no. If we thought it would, we would have said -- filed for changing the warning devices, but we didn't, we filed for closure, so I would say that closure is the option we prefer.⁸⁹

74

Economic costs and operational delays are insufficient grounds for excluding an alternative should public safety warrant exploration of those alternatives. Such considerations are neither explicitly listed nor recognized as grounds to justify petitions for closure of an existing crossing. *See* RCW 81.53.060. By the same token, operational needs and gains that may not be realized in the event the crossing remains open cannot be considered.⁹⁰ The question is whether “the public safety requires the closure” and that has traditionally been decided by weighing the safety gains of closing the crossing against the public convenience and necessity losses. Despite that standard, BNSF and WSDOT’s employees opinions acknowledged such irrelevant factors and were influenced by those other considerations.

75

6. Testimony supports that the Hicock Railway crossing can remain safely open with improvements.

⁸⁸ Ex. No. 7 MacDonlad 4:18-27; 5:1-6.

⁸⁹ MacDonal, TR: 330

⁹⁰ Ex. No. 49 Curl.4:11-17.

76

Testimony was submitted Thomas Zeinz that strategies currently exist that will mitigate the risk of collisions in the event a driver or pedestrian ignore safety warning devices.⁹¹ Two such strategies identified by Mr. Zeinz was grade separation or installation of active traffic control devices.⁹² According to the FRA Handbook, when discussing the identification of alternatives it is critical that consideration of whether the crossing is needed for access over the railroad exist by emergency vehicles:

77

Another important matter to consider in connection with crossing closure is access over the railroad by emergency vehicles, ambulances, fire trucks, and police. Crossings frequently utilized by emergency vehicles should not be closed. *On the contrary, these crossings should be candidates for grade separations or the installation of active traffic control devices.*⁹³

78

As identified previously, the crossing is relied on and used by Fire District Three as the primary route for serving as first responders to fire and medical emergencies in the area. However, limiting such criteria to only first responders would frustrate the overall policy of promoting public safety and must include use of all emergency vehicles. Additionally, Mount Vernon Fire Department, Mclean Road Fire Department, Big Lake Fire Department, Med 2, Med 3, Med 4, and Med 5 all use the crossing to provide emergency services.⁹⁴ Also, emergency vehicles used for evacuation purposes and vehicles used to route necessary equipment, labor and material for flood fight operations in the area must be factored. These vehicles would include use of buses for evacuations and large commercial vehicles to haul rip rap and expedient dumping, vehicles which

⁹¹ Ex. No. 50 Zeinz, 6:20-23.

⁹² Id.

⁹³ Ex. 101 DOT FRA Handbook pg 79

would otherwise be diverted to the smaller narrower roads in the event of closure.⁹⁵

Under the DOT FRA guidelines then, the crossing is an ideal candidate for grade separation or installation of traffic control devices.

79

Mr. Zeinz has set forth a proposal for what devices would make the greatest impact in minimizing the collision risks. According to Mr. Zeinz, installation of four-quadrant gates, the creation of sufficient “turn-arounds” of some fashion and appropriate signage or other method to inform the public of potential extended blockage would safely remain open.⁹⁶ Should the safety improvements be installed as suggested, there would only be a “small” risk of collision at the crossing.⁹⁷

80

C. If the Commission should decide public safety should warrant closure, the convenience and necessity of the public’s use and foreseeable need for the crossing far outweigh any gains to public safety resulting in it closure.

81

Should BNSF succeed in showing public safety requires closure, the Commission must then “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.” DOT v. Snohomish County, 35 Wn.2d 247 (1949)

1. Closure of the crossing adversely affects current public use and need for the crossing and outweighs public safety concerns.

⁹⁴ Harman TR 957:9-11

⁹⁵ Ex. No. 23, Brautaset 4:9-30

⁹⁶ Ex. 50 Zeinz, 7:5-23.

⁹⁷ Id. pg. 8, ln 1-3.

Although the traffic engineer testifying for the Department of Transportation, Garry Norris relied upon February information to account for a crossing which has peak traffic in the months from April 1st to October 1st, it is undeniable that the closing of Hickox Road grade crossing will greatly impair the capacity of people living and working in the radius of two miles around the Hickox Road overpass, Interstate 5 exit 224 from carrying on their business in Sections 30 and 31, Township 34 North, Range 4 East, W. M. and the east half of Sections 25 and 36 in Township 34 North, Range 3 East, W. M. See Boon Prefiled testimony, Jeff Boon⁹⁸, David Boon⁹⁹, Darrin Morrison¹⁰⁰.

Diverting traffic also costs farmers time and money. For the farm land owners who are zoned agriculture natural resource land like Boon and the landowners from whom they rent land for forage, the economic use of the property requires ability to contract with farmers and use processing facilities on the east and west sides of Interstate 5. Interfering with the grade crossing and the use of Hickox Road overpass on Interstate 5 wastes public investment already made. It degrades the value and utility of farmland and leaves the farmland owners with no land use alternatives. The railroad and WSDOT have alternatives. These alternatives do not require diminishing the usefulness of public investments in Interstate 5 and local streets and utilities. They do not require substantial economic harm to farmland as described in the prefiled testimony of Darrin Morrison¹⁰¹

⁹⁸ Exh. 71, 72, 73, and 74, Jeff Boon, Prefiled Testimony, Map, Map, and Photos

⁹⁹ Exh. 67 and 70, David Boon, Prefiled Testimony and Photos

¹⁰⁰ Exh. 84, Darrin Morrison, Prefiled Testimony

¹⁰¹ Exh. 84, Darrin Morrison, Prefiled Testimony

and Jeff Boon¹⁰². If the Utilities and Transportation Commission is not able to “just say no”, then the answer should be that the at grade crossing will remain in place with the appropriate technology to protect the traveling public and that delays due to use of the siding would be mitigated for the protection of people at the grade crossing.

2. Closure of the crossing affects Mount Vernon’s plans and future need for the crossing in order to sustain economic and commercial growth projected in the area.

84 The Commission is to be given the widest latitude to allow all relevant factors entered into evidence when weighing public convenience and necessity against safety gains which expressly includes allowing evidence involving future convenience and necessity for the crossing. Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949); Northern Pac. Ry. Co. v. Department of Public Works, 144 Wash. 47, 256 P. 333 (1927).

85 In Dept. of Transportation v. Snohomish County, the Washington State Dept. of Transportation (at that time the state agency entrusted by the Legislature with the authority to establish under crossings or grade crossings, change the location of an existing highway crossings, or to cause the closing of discontinuance of an existing highway crossing) ordered closing of a grade crossing to vehicular traffic at the location of Park Avenue and the Great Northern Railway tracks in the town of Mukilteo while further ordering the same crossing to remain open for pedestrian traffic finding that the public interest would not be served by closing the crossing to pedestrian traffic . Id. at 254-55. The order, to the extent closure was ordered for vehicular traffic, was reversed

¹⁰² Exh. 71, 72, 73, and 74, Jeff Boon, Prefiled Testimony, Map, Map, and Photos
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by the Superior Court. Id. at 248. The Department and Great Northern Railway appealed the decision to reverse the Department’s Order to close the crossing to vehicular traffic. Id. at 248, 257. While recognizing the need to balance the public interest against the degree of danger of the crossing, the Court *declined* to limit the public convenience and necessity test. Rather, the Court choose not to place such limitations on what evidence the Department entrusted to make the decision allowed so long as the record indicated that the department acted “unfairly, arbitrarily or in disregard of the testimony.” Id. at 258. The Court, citing a previous ruling, stated the rationale for such a hands off approach:

86 “Unless we can say that the order of the commission [Department of Public Service] is wrong in the sense that its discretion has been arbitrarily exercised, we must, under well settled rules, say that it is not to be overcome by judicial decree. To do so would be but to substitute our own will for that of the commission, and in so doing we would in all probability trench upon some equities while declaring others.” Dept. of Transportation v. Snohomish County at 258 *citing* State ex rel. Tacoma Eastern R. Co. v. Northern Pac. R. Co., 104 Wash. 405, 413, 176 Pac. 539.

87 The Commission should be given the widest latitude to allow all relevant factors entered into evidence to which the Commission is then entitled to weigh in making its findings on whether closing of the crossing lies within the public interest.

88 Most importantly and pertinent to the case at bar, during the Court’s discussion on what latitude it will give the Department when it conducts such review, the

Court in Dept. of Transportation v. Snohomish County specifically cited and relied on a previous ruling in which the findings of public convenience and necessity by a state agency were challenged. Id. at 257; *citing Northern Pac. Ry. Co. v. Department of Public Works*, 144 Wash. 47, 256 P. 333 (1927). In Northern Pac. Ry. Co., the Appellants challenged the Department’s findings of public convenience and necessity on the grounds that the department “was not authorized to speculate as to future convenience and necessity.” Id. at 52. Appellant argued that the Department must make such finding “only upon a showing of present convenience and necessity.” Id. at 52.

89 The Supreme Court in Northern Pac. Ry. Co., citing to the broad regulatory powers conferred upon the department by statute, specifically rejected placing such a limitation. Id. at 54. By doing so the Court specifically stated the Department decision to examine future developments to base part of its findings of public convenience and necessity is permissible finding that if the contemplated situation should not occur no harm will have been done on account of the Commission’s order, on the other hand, if the contemplated growth should occur all controversy of convenience and necessity will have been disposed of. Id. at 54.

90 Moreover, the Court goes on to state that such evidence **should be allowed** citing other state authority as an example where the principle and procedure for such a determination is the same:

91 The principle and procedure are similar to that announced in the case of Wabash. C. & W. Ry. Co. v. Commerce Commission, 309 Ill. 412, 141 N.E. 212.’The Commerce Commission has a right to, *and should, look to the future* as well as to the present situation. Public Utilities are expected to provide for

the public necessities, not only today, but to anticipate for all future developments reasonably to be foreseen. The necessity to be provided for is not only the existing urgent need, but the need to be expected in the future, *so far as it may be anticipated from the development of the community, the growth of industry, the increase in wealth and population, and all the elements to be expected in the progress of a community.* *Id.* at 54. (emphasis added)

92

The City of Mount Vernon has commissioned and completed in June 2006 a lands needs study, which it has formally adopted by resolution, to form a part of the basis on how the City shall plan for growth in its 20 year planning horizon.¹⁰³ The study relies both existing conditions and reasonably foreseeable development of the community in order to anticipate the growth needs for the City in Mount Vernon over the next twenty years. Specifically the study uses forecasted and allocated population growth numbers provided by the State Office of Financial Management, the land market supply, the existing capacity and need for such lands, existing urban densities and infill opportunities, availability of adequate services, proximity of lands to designated natural resource lands, the presence of critical areas, employment trends and target goals based on policy decision to reach a healthy jobs/housing balance.¹⁰⁴

93

It is reasonably foreseeable that the crossing will be needed to support commercial growth over the next 20 years.

94

The Crossing is located at the very South end of the City limits.¹⁰⁵ Properties within the City limits are zoned commercial and are currently involved in commercial

¹⁰³ Exhibit 33.

¹⁰⁴ Ex. No. 33 Hanson 2:26-30; 3:1-3

¹⁰⁵ Id. 6:1-2

development.¹⁰⁶ Based on the study, the physical characteristics of area, its adjacency to I-5, proximity to commercial/industrial land uses as well as infrastructure, it is a high likelihood that development activity will increase in that area.¹⁰⁷ Closure of the Hickox Roads crossing would interfere with that development.¹⁰⁸ The attendant public need for transportation infrastructure to accommodate such commercial and industrial activity is absolutely necessary.¹⁰⁹

IV. CONCLUSION

Significant and fundamental error occurred when BNSF petitioned for closure on the grounds of proposing a new crossing in the form of siding track over Hickox Road. The statutory framework of RCW 81.53 et. seq., the policy which supports it, and equity, require BNSF and WSDOT as project proponent to shoulder the responsibility of adequately mitigating the dangerous conditions caused by constructing the siding project across a public road. The law is clear, whenever a new grade crossing is proposed the proponent must petition the Commission with the reasons why the crossing cannot be made either above or below grade. After investigation by the Commission it may find that grade separation is practical and required or that it is not practical and enter a written order in the cause, either granting or denying the right to construct a grade crossing at the point in question providing in the order safety improvements necessary to secure the safety of the public and railroad

¹⁰⁶ Id. 6:7-23

¹⁰⁷ Id. 6:27-30

¹⁰⁸ Id. 7:18-20

¹⁰⁹ Id. 7:24-26

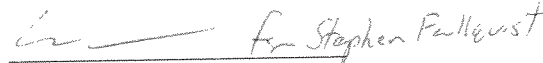
employees if it should grant the right to construct. BNSF's Petition for closure presumes this right to construct and, if granted, would avoid their responsibility at the expense of eliminating valuable transportation infrastructure needed by local jurisdictions and the public to provide essential emergency services and to protect the public from flooding dangers, support the agricultural industry in the area, and to accommodate the necessary and foreseeable commercial growth to come all of which outweigh any small gains to public safety achieved by reducing the risk of a collision with a train by a driver who willfully ignores safety measures. Simply put, their arguments assume that a petitioner can cause a harm and then complain of that harm as a reason for closure while not accounting for the loss of public convenience or necessity for the traveling public. This contention by BNSF is like the plea of a man accused of murdering his parents asking for mercy because he is an orphan. Petitioner's request for closure of the crossing amounts to an attempt to save expenses and their budget rather than for truly achieving mitigation for the hazards caused by the siding project..

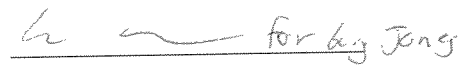
95 DATED this 25th day of February, 2008

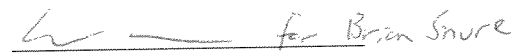


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DECLARATION OF SERVICE

Chrissy Sprouse states and declares as follows:

I am a citizen of the United States of America, over 18 years of age and competent to testify to the matters set forth herein. On February 15, 2008, I hereby certify that I have this day served by first class mail, postage prepaid, a true and correct copy of the foregoing document(s) upon all parties of record in this proceeding entitled *MOUNT VERNON, SKAGIT COUNTY, WEST VALLEY FARMS, AND FIRE PROECTION DISTRICT NO. THREE'S POST HEARING BRIEF* with attached *DECLARATION OF SERVICE* on the following:

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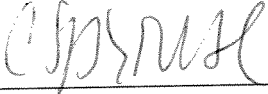
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Chrissy Sprouse, Paralegal