

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. TR-070696

BNSF RAILWAY COMPANY,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent.

**POST-HEARING BRIEF
ON BEHALF OF COMMISSION STAFF**

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ROBERT M. MCKENNA
Attorney General

JONATHAN C. THOMPSON
Assistant Attorney General
Office of the Attorney General
Utilities & Transportation Division

1400 S Evergreen Park Drive SW
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1225

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I. INTRODUCTION.

A. Summary of Issues.

1 BNSF Railway Company, with funding from the Washington State Department of Transportation (WSDOT), plans to build a new siding track through the present location of the Hickox Road at-grade crossing. Federal law does not allow the Commission to prevent the construction of the siding, or to direct that the siding be built at another location. Instead, the Commission's role is to determine the appropriate highway-rail crossing design, including whether Hickox crossing should be closed and traffic diverted to another crossing, or whether changes should be made to Hickox and to alternative crossings.

2 In this case, therefore, the Commission must decide these issues:

1. Given the dangers that would exist if the Hickox Road crossing were to remain open over the existing mainline and the new siding track and the fact that the railroad's use of the siding may result in frequent, unscheduled blockings of the roadway, does "the public safety require the closure" of the crossing and the diversion of traffic to other crossings? More specifically, do the anticipated hazards of the crossing outweigh the public's convenience and need to keep the crossing open?
2. If the crossing is closed (or converted to an emergency access point with locked gates), what measures should the Commission require in order to ensure that traffic is safely diverted to another channel?
3. What, if any, safety measures would mitigate the additional hazard caused by the siding track such that the crossing could safely remain open?
4. How should the Commission apportion the costs associated with any safety improvements that would enable the crossing to remain open?

B. Summary of Staff's Recommendation on the Issues.

3 Commission Staff recommends that the Commission find as follows, with respect to these questions:

1. Unless safety measures recommended by Staff (see No. 3 below) are put in place, the Commission should find that the public safety requires the closure of the Hickox Road crossing. (This is not intended to preclude the possibility of a settlement among some or all of the parties, that the crossing be equipped with locked gates, and that it be used only in emergencies).
2. If the crossing is closed (or converted to a private crossing for limited emergency access purposes), the Commission should require the proponents to pay for the construction of turnarounds on Hickox Road and turning radius improvements (where Hickox and Stackpole intersect Dike Road) in order to facilitate the safe diversion of traffic to the Stackpole crossing. In addition, the Commission should require, as a condition of closure (and consistent with the proponent's proposal), that the proponents install two-quadrant gates and lights at the Stackpole grade crossing. The Commission should leave to WSDOT the decision of what mitigation is appropriate for impacts to the operations of Fire District 3.
3. The Commission should find that the Hickox Road crossing can safely remain open if either four-quadrant gates or, at least, two-quadrant gates with a median barrier and appropriate signage are put in place to mitigate the otherwise increased likelihood that motorists would attempt to circumvent ordinary, two-quadrant gates.

The Commission should also find that public safety requires the installation of lights and gates at the Stackpole crossing, even if the Hickox crossing remains open, to address the partial diversion of traffic from Hickox to Stackpole.

4. The Commission should allow the respective road authorities an opportunity to keep the Hickox crossing open, if they agree to pay their apportionment of costs necessary to install appropriate warning devices at Hickox and Stackpole crossings. If the road authorities agree, the Commission should apportion the cost of improvements necessary to keep Hickox Road grade crossing open as follows:

a. Consistent with RCW 81.53.275 and .271, the Commission should apportion the cost of installing gates, lights, signage, and (if applicable) median barriers at Hickox and Stackpole grade crossings as follows: The first \$20,000 of the improvements to be made at each crossing to the railroad. The remaining cost should be apportioned 70 percent to the railroad and 30 percent to the respective road authorities. The Commission should set a deadline by which the road authorities must commit to make the Commission-specified financial contribution to the installation of the required warning devices. If the road authorities decline to pay their share, then the railroad's request to close the Hickox Road crossing should be deemed granted, subject to the conditions described in No. 2 above.

b. If the Hickox Road grade crossing remains open, then Commission should not require any roadway improvements (other than those described in subsection a, above) that may be necessary to address the frequent blocking of Hickox Road as a result of railroad operations.

II. LEGAL STANDARD AND LIMITATIONS ON THE COMMISSION'S AUTHORITY.

A. Legal Standard.

4 RCW 81.53 grants the Commission the authority to regulate the safety of railroad grade crossings. RCW 81.53.020 states a legislative preference for overcrossings and undercrossings, where practicable, and prohibits the construction of an at-grade crossing without Commission approval.

5 BNSF initiated this proceeding by filing a petition in accordance with RCW 81.53.060. The relevant portion of RCW 81.53.060 states that:

any railroad company whose road is crossed by any highway, may file with the commission . . . its petition in writing, alleging that the public safety requires . . . [1] an alteration in the method and manner of an existing crossing and its approaches, or in the style and nature of construction of an existing . . . grade crossing, or . . . [2] the closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing . . . [Enumeration added.]

BNSF's petition seeks the relief described in clause two—closure of the Hickox crossing and diversion of travel to another crossing. In the case of *Department of Transportation v. Snohomish County*,¹ the court concluded that the Commission's authority under this provision extended to considering "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."² The Commission has continued to follow this same balancing test.³

¹ *Dept. of Transportation v. Snohomish County*, 35 Wn.2d 247 (1949) ("*Snohomish County*").

² *Snohomish County*, 35 Wn.2d at 254.

³ See *Burlington Northern Santa Fe v. City of Ferndale*, TR-940330 (March 31, 1995); *Burlington Northern Railroad Co. v. Skagit County*, TR-940282 (Dec. 13, 1996); *Union Pacific Railroad v. Spokane County*, TR-950177 (July 3, 1996).

6 Factors considered by the Commission in deciding requests to close grade crossings have included: 1) the amount and character of travel on the railroad and on the highway; 2) the number of people affected by the closure; 3) whether there are readily available alternate crossings in close proximity that can handle any additional traffic, which would result from the closure, and 4) whether the alternative crossings are safer than the crossing proposed for closure.⁴

7 When a railroad petitions to close a crossing, it is free to include in its petition a commitment to make or fund any changes that help to tip the scale in favor of closure based on one or more of the factors noted above. Thus, if the alternate crossing is not demonstrably safer than the crossing that is proposed for closure, the proponent can offer (as a voluntary condition precedent) to upgrade the safety of the alternate crossing in some way. If the alternate crossing is not “readily available” because the route by which traffic would be diverted is substandard, the proponent can offer to fund actions necessary to improve the ability of motorists to safely divert to the alternate crossing. To the extent that the Commission regards such offers or commitments as dispositive in its decision to grant closure, the Commission should state as much in its order, and should state that the proponent must honor its commitment prior to, or contemporaneous with, closure.

8 Although BNSF has requested closure of the Hickox crossing, the Commission has the latitude to consider whether the railroad’s petition is better addressed under the clause denoted by the number one in above language (*i.e.*, whether “that the public safety requires . . . an alteration in the method and manner of an existing crossing and its approaches, or in the style and nature of construction of an existing . . . grade crossing”). This latitude is

⁴ *Id.*

apparent from RCW 81.53.070, which authorizes the Commission to consider many different forms of relief in response to a petition under RCW 81.53.060:

At the conclusion of the hearing the commission shall make and file its written findings of fact concerning the matters inquired into.... The commission shall also enter its order based upon said findings of fact, which shall specify whether the highway shall continue at grade or whether it shall be changed to cross over or under the railroad in its existing location or at some other point, and whether an over-crossing or under-crossing shall be established at the proposed location of any street or highway or at some other point, or *whether the style and nature of construction of an existing crossing shall be changed, 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* . . . [Emphasis added.]

Because the railroad is asserting that its planned siding track is the reason for its petition, the petition necessarily raises the possibility that the Commission may order the lesser relief of an order authorizing the railroad to change the “method and manner” or “style and nature of construction” of the Hickox Road crossing to include a siding track.⁵ In the context of such an order, the Commission may find that public safety requires changes to minimize the dangers that the proposed siding track would otherwise cause at the Hickox crossing.

9 If the Commission chooses to specify changes to a crossing, however, another issue then arises: how to apportion the cost of those changes among the affected parties. Here, too, the legislature has afforded the Commission a large measure of discretion. RCW 81.53.110 authorizes the Commission to apportion cost in such manner as justice may require (subject to an apportionment formula that applies more specifically to the cost of installing signals and warning devices, described below):

⁵ Although this request is similar to a petition for a new crossing, which would be governed by RCW 81.53.030, the addition of a new track is better viewed as a change in the “method or manner” or “type” of crossing, subject to commission approval under RCW 81.53.060. That is because “grade crossing” is defined as any point where a “railroad” crosses a “highway.” “Railroad,” then, is defined as including “every railroad . . . with all . . . sidings . . . used, operated, controlled, managed, or owned by or in connection therewith.” RCW 81.53.010. See also RCW 81.53.090, discussing “crossings involving more than one track.”

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

10

While the statutory sections set out above deal generally with changes to crossings and apportionment of the cost of such changes, a later-enacted portion of RCW 81.53 (RCW 81.53.261 through .295) specifically addresses questions of need and cost apportionment for “signals and warning devices” at grade crossings.⁶ RCW 81.53.261 provides that a city or county, or the Commission on its own motion, may initiate an inquiry into the need for new or changed signals, or warning devices, at grade crossings.

Whenever the . . . governing body of any city . . . or county, or any railroad company whose road is crossed by any highway, shall deem that the public safety requires signals or other warning devices, other than sawbuck signs, at any crossing of a railroad at common grade by any . . . city, . . . or county highway, road, street, . . . he or it 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 crossing warning devices. . . . *If the commission shall determine from the evidence that public safety requires the installation of such signals or other warning devices at such crossing or such change in the existing warning devices at said crossing, it shall make determinations to that effect and enter an order directing the installation of such signals or other warning devices or directing that such changes shall be made in existing warning devices. The commission shall also at said hearing apportion the entire cost of installation and maintenance of such signals or other warning devices, other than sawbuck signs, as provided in RCW 81.53.271....*

The hearing and determinations authorized by this section may be instituted by the commission on its own motion, and the proceedings, hearing, and

⁶ “Generally, rules of statutory construction indicate that where a later enacted statute on the same subject is the more specific, it will control the earlier and more general statute.” *Schumacher v. Williams*, 107 Wn. App. 793, 801 (2001).

consequences thereof shall be the same as for the hearing and determination of any petition authorized by this section. [Emphasis added.]

Because no party has specifically petitioned for signals or warning devices in this case, this provision may seem inapplicable. However, BNSF's petition includes a proposal to install signals and warning devices at Stackpole (in order to obtain approval for closure of Hickox), and Staff has recommended signals and warning devices at both Hickox and Stackpole crossings as an alternative to closure of Hickox (as a change in the "style and nature of construction of an existing crossing" or a "change that the commission may find advisable or necessary," under RCW 81.53.070). Moreover, RCW 81.53.261 authorizes the Commission to determine, on its own motion, that the public safety requires the installation of signals and warning devices at a crossing.⁷

11 RCW 81.53.271 addresses the apportionment of the cost of installing signals and warning devices when their installation is directed by the Commission:

[I]f installation is directed by the commission, it shall apportion the cost of installation and maintenance as provided in this section:

(1) Installation: (a) The first twenty thousand dollars shall be apportioned to the grade crossing protective fund created by RCW 81.53.281; and

(b) The remainder of the cost shall be apportioned as follows:

(i) Sixty percent to the grade crossing protective fund, created by RCW 81.53.281;

(ii) Thirty percent to the city, town, county, or state; and

(iii) Ten percent to the railroad . . .

⁷ Additionally, Staff believes that the cost apportionment for any signals and warning devices should be the same in this case as it would be if (1) the City or County were petitioning the Commission for new or upgraded signals and warning devices under RCW 81.53.261, in response to the railroad's planned construction of a new siding track; or (2) the railroad were petitioning to change the crossing to include a new siding, and simultaneously for an order directing the installation of new signals and warning devices under RCW 81.53.261. To do otherwise would be to elevate the form of the pleading over the substance.

The above formula is only partly relevant to the apportionment of the cost of signals and warning devices in this case, however, because no party has secured money from the grade crossing protective fund. Under that circumstance, the relevant cost apportionment statute is RCW 81.53.275, which provides:

In the event funds are not available from the grade crossing protective fund, the commission shall apportion to the parties on the basis of the benefits to be derived by the public and the railroad, respectively, that part of the cost which would otherwise be assigned to the fund: PROVIDED, That in such instances the city, town, county or state shall not be assessed more than sixty percent of the total cost of installation on other than federal aid designated highway projects: AND PROVIDED FURTHER, That in such instances the entire cost of maintenance shall be apportioned to the railroad. [Emphasis added.]

Under this statute, the Commission *may not* assess more than 60 percent of the total cost of installation of signals and warning devices to the road authority. On the other hand, the Commission may only assign the first \$20,000, and 70 percent of the remainder, to the railroad (*i.e.*, the total of the railroad's 10 percent share under RCW 81.53.271, and "that part of the cost which would otherwise be assigned to the fund" under the same statute). Thus, no less than 30 percent of the cost beyond the first \$20,000 can be assigned to the road authority. Between these limitations, the Commission is to apportion the cost "to the parties on the basis of the benefits to be derived by the public and the railroad, respectively."

12

The cost of items other than "signals and warning devices," such as the crossing surface and any necessary changes the roadway surface to smooth the transition to the crossing surface, may be apportioned in accordance with the more general "as justice may require" language of RCW 81.53.110.

B. Limitations on the Commission’s Authority Regarding the Construction and Use of the Planned Siding Track.

1. The Commission cannot prevent the construction of the siding, or direct that the siding be built at another location.

13 The Interstate Commerce Commission Termination Act (ICCTA) grants exclusive authority to the federal Surface Transportation Board (STB) over a broad range of railroad activities. Section 10501 of the ICCTA, which governs the STB’s jurisdiction, states the STB will have exclusive jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.”⁸ The same section sets forth that “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”⁹

14 In *City of Auburn v. U.S. Gov’t*,¹⁰ the Ninth Circuit Court of Appeals upheld an opinion of the Surface Transportation Board, holding that BNSF was not subject to state and local environmental permit requirements when it sought to reopen its Stampede Pass line through the city of Auburn, Washington. The court reviewed the preemptive language of the ICCTA, stating “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.”¹¹ Although the City of Auburn argued that the ICCTA preempted only state “economic” regulations and not “environmental” permitting requirements, the court stated: “if local authorities have the ability to impose ‘environmental’ permitting regulations on the railroad, such power will in

⁸ 49 U.S.C. § 10501(b)(2).

⁹ 49 U.S.C. § 10501(b).

¹⁰ 154 F.3d 1025 (1998).

¹¹ *Id.* at 1030 (citation omitted).

fact amount to ‘economic regulation’ if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.”¹²

Thus, even setting aside the extent of the Commission’s state statutory authority, federal law clearly removes any ability on the part of the Commission to prevent the planned extension of the siding track across Hickox Road.

2. The Commission’s crossing blocking rule cannot be enforced in a manner that would prevent the use of the siding for its intended purpose.

15 The Commission has adopted a rule, WAC 480-62-220, which prohibits railroad companies from blocking a grade crossing “for more than ten consecutive minutes, if reasonably possible.” The rule also provides that, if it can do so in a manner consistent with federal regulations, the railroad must clear a blocked grade crossing when the engineer becomes aware that the crossing is being approached by a law enforcement or other emergency services vehicle with its emergency lights flashing.

16 The application of the Commission’s blocking rule is limited by its own terms. First, it applies only to a stopped train,¹³ and not, for example, to a lengthy train moving slowly past a crossing. Second, the Commission’s blocking rule only prohibits blocking a crossing with a standing train for more than 10 minutes “if reasonably possible.”

17 The application of the blocking rule is also limited by federal preemption. In *City of Seattle v. Burlington Northern Railroad Co.*,¹⁴ the Washington Supreme Court invalidated a City of Seattle ordinance that purported to limit to four minutes the amount of time BNSF could block a street with its switching operations, and prohibited switching operations over city streets during certain peak use times during the day. The Court held that the ordinance

¹² *Id.* at 1031.

¹³ WAC 480-62-220(3): “A grade crossing is ‘blocked’ if any part of a *stopped* train occupies the crossing. . . .” [Emphasis added.]

¹⁴ 145 Wash.2d 661, 41 P.3d 1169 (2002).

was invalid under the ICCTA, which reserves to the STB exclusive authority over “switching” operations.¹⁵ The court also held that the ordinance was invalid under the Federal Railroad Safety Act (FRSA), which provides that “[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable.”¹⁶ The Court held that by limiting the amount of time the train can occupy the crossing, the ordinance touches on the subjects of train speed, train length, and trains in physical motion, all of which are regulated (from a safety standpoint) by the Federal Railroad Administration.¹⁷ Thus, even with the limitations that exist in the blocking rule itself, the circumstances under which the rule can be enforced are circumscribed to a large extent by federal law.

18

There is considerable evidence in the record, including the testimony of Staff’s witness, Mr. Zeinz, that it would not be “reasonably possible” for BNSF to avoid blocking Hickox Road during the railroad’s planned meet and pass operations. Hickox Road is likely to be blocked when there is a train in the siding that is too long to fit between Hickox Road and the Blackburn Road crossing to the north. Requiring the railroad to separate the train at Hickox would result in additional delays of far longer than 10 minutes, and would substantially defeat the operational efficiencies that are the reason for constructing the siding in the first place. If the Hickox Road crossing were to remain open, BNSF would not need a waiver from the blocking rule in order to block Hickox Road with a train that is too long to fit between Blackburn and Hickox, and is waiting to be met or passed by train on the mainline. On its face, WAC 480-62-220 only requires a railroad company to avoid blocking a grade crossing when “reasonably possible.”

¹⁵ *Id.* at 668-9.

¹⁶ 49 U.S.C. § 20106

¹⁷ 145 Wash. 2d at 673.

III. SUMMARY OF FACTS.

19 The City, County, Fire District, Boon Intervenor, and public testimony shows that—in addition to providing more convenient access to Old Highway 99 and I-5 for residents living west of the railroad tracks—the Hickox Road crossing presently serves a number of important purposes. There is evidence that Hickox Road provides the safest and most convenient route for people engaged in agricultural operations, such as the Boons, to move their products and equipment between the east side of the railroad tracks and the I-5 overpass.¹⁸ The Hickox crossing is also the most direct route for emergency response from Cedardale station to a portion of the area served by that station.¹⁹ Finally, in the event of a flood, or the imminent threat of a flood of the Skagit River at or below Mount Vernon, the Hickox grade crossing is a potential route for trucks to bring rock to a flood fight from a quarry on Cedardale Road, east of I-5, or for the evacuation of people and livestock.²⁰

20 Neither BNSF nor WSDOT sponsored any expert testimony to rebut the opponents' evidence of flood fight or evacuation, emergency, and agricultural needs for the crossing, though they made various attempts, through cross-examination, to cast doubt on the *degree* of importance of the Hickox crossing for flood evacuation and emergency response. Mr. Norris's traffic study for WSDOT primarily addresses issues that were not raised by the opponents—such as whether the routes and intersections to which traffic would be diverted could handle the additional traffic without a decrease in the level of service under ordinary peak hour conditions.²¹ Mr. Norris also proposed various actions to mitigate the traffic

¹⁸ Exh. No. 71, pp. 2-7, J. Boon.

¹⁹ Exh. No. 88, 13:1-16:23, Rabel; Exh. No. 86.

²⁰ Exh. No. 23, 6:7-10:27, Brautaset.

²¹ Exh. No. 11, 4:15-24:24, Norris.

impacts of closing the Hickox crossing.²² Although Mr. Norris did address emergency response impacts, he did not refute that closure would result in a delay in response time to the affected area from the Cedardale fire station. He merely asserted that the response time is still within acceptable standards.²³

21 Mr. Norris's analysis,²⁴ together with an explanation offered by Staff's witness, Mr. Zeinz,²⁵ strongly support the conclusion that closure of that Hickox crossing could actually result in a small decrease of traffic using the Blackburn crossing. Hickox crossing users will mostly divert to the Stackpole crossing.²⁶ Because of this, even though Staff has concerns about the safety of Blackburn crossing, it has concluded that its concerns would best be addressed outside of the context of this docket.

22 Although Mr. Norris's reply testimony refers to a cost-benefit analysis for closing Hickox and installing gates and lights at Stackpole, on re-direct he clarified that the cost-benefit ratio was much lower under a revised analysis than under the analysis he referred to in his testimony.²⁷ Significantly, no analysis was done of the costs and benefits of installing lights, gates, and median barriers at Hickox and lights and gates at Stackpole for comparison. Moreover, the cost-benefit analysis is quite generic and cannot take into account case-specific business impacts like those described by the Boons, emergency response delay costs, or costs associated with loss of a flood fight or flood evacuation route.²⁸

²² Exh. No. 13, p. 63 (turning radii improvements), p. 51 (mitigation for impact on fire service response); Norris, TR. 765:2-766:2 (turnarounds).

²³ Exh. No. 13, pp. 60-62.

²⁴ Norris, TR. 784:3-785:5.

²⁵ Zeinz, TR. 1189:22-1191:1.

²⁶ Exh. No. 13, pp. 36, 38 (in table on page 38, compare change in peak hour turning movements resulting from closure for 2006 at Blackburn/Old Highway 99 [-5] with Stackpole Road/Conway Frontage [+25]).

²⁷ Norris, TR. 802:9-804:14.

²⁸ Exh. No. 126, pp. 21, 22 (list of costs and benefits considered in GradeDec.net model).

One way to rebut the evidence of public need for the crossing could have been to provide more definite testimony regarding the likely percentage of time, on a daily or weekly basis, that Hickox Road would be blocked as a result of the railroad's planned meet and pass operations. If that number was as great as say, 50 percent, then the usefulness of the Hickox crossing for day-to-day uses would obviously be quite diminished. In fact, the most definitive testimony on this point is still quite vague. Although Mr. Gordon testified that the siding likely would be used six to eight times per day once operational, and that trains could be stopped in the siding for "minutes to several hours," this does not translate to a likely amount of time, on a daily basis, that the crossing would be unavailable for use by motorists.²⁹ Mr. Gordon's cross-examination testimony suggests that the railroad would not park trains on the siding for other than meet-and-pass purposes, except in the unusual circumstance that there was a landslide across the tracks that rendered the line impassible.³⁰ His cross-examination testimony suggests that the ordinary use of the siding would be for relatively quick meets and passes.³¹ As explained above, the Commission's crossing blocking rule would not require that parked trains be broken at Hickox during these ordinary meet-and-pass operations; to do so would result in longer delays, and could disrupt railroad operations in way that is prohibited by federal law. However, if the siding were merely used for storage of cars during a slide or similar event, there is no reason why the blocking rule should not apply and require the railroad to cut cars at Hickox Road to enable use of the crossing by motorists.

These are the basic facts on the public convenience and necessity side of the scale. On the other side of the scale is the evidence of hazard at the crossing. Just as the

²⁹ Exh. No. 1, 2:12-24, Gordon.

³⁰ Gordon, TR. 695:17-696:18.

³¹ Gordon, TR. 697:25-700:9.

opponent's evidence of public need for the crossing is largely un rebutted, the proponents' (and Staff's) evidence regarding the special hazards of a crossing over mainline and siding track is wholly un rebutted. The evidence shows that the addition of a siding track at Hickox Road, and the operations anticipated with respect to that siding, will diminish crossing safety in three important respects.

25 First, because of lengthy blocking, motorists may try to "beat the train" when they see one approaching by driving around the lowering or lowered gates in a serpentine movement.³²

26 Second, when a train is in the siding, but is pulled clear of Hickox Road (most likely to the north) in order to allow use of the crossing, the gates and lights may nonetheless be activated (in the down position) as a result of a train approaching on the mainline. When that occurs, a motorist waiting at the crossing may mistakenly conclude that the standing train is causing the gate to be lowered and may decide to drive around the gates (again, in a serpentine motion), and be struck by the approaching train that is obscured from the motorist's view by the standing train.³³

27 Third, because Hickox will be blocked at times by standing trains (though, again, it is unclear how much), the Stackpole crossing will have increased motor vehicle traffic, and there will be increased train traffic, including high speed passenger trains.³⁴

28 If there were no way to mitigate these hazards, then the balance of need versus hazard would tip in favor of closure. However, as Mr. Zeinz and Mr. Curl's testimony

³² Exh. No. 7, 3:1-22, MacDonald; Exh. No. 50, 2:20-3:16, Zeinz.

³³ Exh. No. 50, 5:1-6:17, Zeinz.

³⁴ Exh. No. 1, 2:12-24, Gordon.

demonstrate, there *are* ways to minimize these dangers to an acceptable level,³⁵ but they require the expenditure of money by both the proponents and the road authorities.

29 First, two-quadrant gates plus crossing arms would have to be reinstalled at Hickox Road following construction of the siding, and a median barrier would have to be installed to discourage serpentine movements around the closing or closed crossing arms.³⁶ (Another option is four-quadrant gates, which Mr. Zeinz recommended because of the difficulty a motorist might have when attempting to turn around at a crossing, equipped with a median barrier.³⁷ Staff believes that the road authorities could likely solve this problem to their own satisfaction without the expense of four-quadrant gates.³⁸) Additionally, signs indicating that the crossing may be blocked for long periods should be placed far enough in advance of the crossing to enable motorists to turn around before pulling up to the crossing. At the crossing, signs should be placed to warn motorists that another train may be approaching on the second track.

30 Second, gates and lights would have to be installed at Stackpole Road to ensure the safety of motorists diverted to Stackpole by the blocking of Hickox Road. The Stackpole crossing lacks active warning devices.³⁹ Before Hickox Road was equipped with active warning, it experienced two accidents, one of which was fatal.⁴⁰ Stackpole has a much higher accident prediction rate under the FRA's grade-crossing inventory than does Hickox, under its present configuration with gates and lights.⁴¹ The Grade Crossing Handbook recommends that active warning devices be used at all crossings where high speed

³⁵ Exh. No. 50, 6:19-8:17, Zeinz; Curl, TR. 889:13-890:2.

³⁶ Curl, TR. 889:13-890:2.

³⁷ Exh. No. 50, 6:17-7:14, Zeinz; Zeinz, TR. 1196:14-1197:7.

³⁸ Curl, TR. 889:13-890:2.

³⁹ Exh. No. 52, 8:2-3, Johnston.

⁴⁰ Norris, TR. 773:16-774:17.

⁴¹ Exh. No. 102, pp. 4, 5 (Stackpole = 0.0269 pred. collisions per year, Hickok [sic.] = 0.00851 pred. collisions per year).

passenger rail is present (as it is here).⁴² It is likely that some motorists who presently use Hickox will divert to Stackpole, even if Hickox remains open, because of trains blocking the crossing.

31

The various possible improvements, the available cost estimates for each, and Staff's apportionment recommendations, are as follows:

- "Widening" Hickox crossing with two-quadrant gates and lights: \$145,000 to \$175,000.⁴³ (Required only if Hickox remains open. Signals and warning devices to be apportioned between railroad and City. Crossing and approach surface improvements to the railroad.);
- Installing of median barriers: unknown, perhaps \$10,000. (Required if Hickox remains open. To be apportioned between railroad and City.);
- Installing appropriate signage on the approaches to Hickox crossing: unknown. (Required only if Hickox remains open. To be apportioned between the railroad and City.);
- Installing new gates and lights at Stackpole: \$150,000⁴⁴ (Required whether Hickox is closed or remains open. Because the proponents have offered to bear this cost to improve the prospects of their petition for closure, this cost should only be apportioned between the Railroad and County if Hickox remains open.);
- Constructing turnarounds on both sides of the closure: \$60,000 to \$100,000⁴⁵ (Required only if Hickox is closed. To be borne by the proponents.);

⁴² Exh. No. 101, p. 205, Sec. D, para. 7.

⁴³ Exh. No. 13, p. 60 (\$175,000) and App. C, first page (\$145,080).

⁴⁴ See Exh. No. 13, App. C, second page, line item entitled "crossing signals with gates/communications/electrical."

⁴⁵ Norris, TR. 772:16-773:9.

- Constructing turning radius improvements at the corner of Stackpole and Dike, and Hickox and Dike: \$30,000⁴⁶ (Required only if Hickox is closed. To be borne by the proponents.);
- Providing mitigation for the Fire District: unknown⁴⁷ (Only required if crossing is to be closed. Should not be included as a condition of closure because there is no acceptable proposal on the record. However, WSDOT may provide mitigation consistent with its SEPA⁴⁸ analysis.)

IV. ARGUMENT.

32 Staff believes that the testimony of its witness, Mr. Zeinz, and of various BNSF witnesses, shows that, in the absence of some additional safety measures to prevent the increased risk of “gate running” by motorists, public safety requires the closure of the Hickox Road crossing.

33 Although BNSF has petitioned to close Hickox crossing, the Commission has the latitude to consider the lesser relief of leaving the crossing open, with required changes such as the installation of signals and warning devices. The evidence indicates that Hickox could safely remain open if warning bells and lights, two-quadrant gates, median barriers, and appropriate signage were installed at Hickox, and warning bells and lights and two-quadrant gates were installed at Stackpole.

34 Staff’s witness Tom Zeinz expressed the essential issue in the case when he said: “it becomes a value judgment as to whether the potential advantages of retaining the crossing can justify [the expense of warning device upgrades], especially considering the fact that it

⁴⁶ Norris, TR. 767:17-765:1.

⁴⁷ Exh. No. 11, 23:25-26, Norris.

⁴⁸ State Environmental Policy Act, RCW 43.21C.

will still be blocked and rendered unusable from time to time.”⁴⁹ On the record that has been assembled, it is very difficult for the Commission to make this value judgment. Staff believes the Commission does not have to.

35 The Commission can and should answer the question: “does the public safety require the closure?” The answer to this question is “yes,” if no improvements are made to prevent motorists from driving around the gates. On the other hand, the answer is “no,” and the crossing may safely remain open, if the safety measures Staff has described are put in place to discourage the increased danger of gate running. Staff also believes that it would be irresponsible not to require the parties to address the likely increase in traffic at the Stackpole crossing by installing gates and lights there even if Hickox remains open.

36 Because RCW 81.53.275 requires road authorities to pay a substantial portion of the cost of new or changed signals and warning devices, those entities have a strong incentive to make, for themselves, the “value judgment” to which Mr. Zeinz refers. Staff, therefore, recommends that the Commission afford the City and County (as the road authorities in this case) the option of keeping Hickox crossing open, if they are willing to commit, by a date certain, to fund their share of the necessary improvements.

37 Staff interprets RCW 81.53 to require the road authorities to pay at least 30 percent of the cost (beyond the first \$20,000) of the signals and warning devices that Staff believes are necessary preconditions to leaving the Hickox crossing open to the public. Staff believes that this measure of financial responsibility will force the road authorities to consider whether the Hickox Road crossing is a high enough priority within their respective budgets to justify the expenditure that would be necessary to keep Hickox open without an unreasonable risk to public safety.

⁴⁹ Exh. No. 50, 8:14-17, Zeinz.

On the other hand, Staff believes that it is appropriate for BNSF to bear the remainder of the cost under the “benefits to be derived” standard of RCW 81.53.275, because BNSF is changing the *status quo* at Hickox Road in a way that would, without some additional improvements, create new hazards for motorists. Mr. MacDonald acknowledged that:

[T]o put it simply, the person that initiated the project that created the [safety] issue from what I understand would be responsible for the cost of the changing of the warning devices or the other roadway approaches so that it does not impose on the other party a burden they didn’t ask for.⁵⁰

As Mr. Curl similarly stated in his testimony, the policy underlying much of RCW 81.53 is to place responsibility on the railroad when it proposes changes at a grade crossing for the sake of its operations, to bear the cost of reducing or eliminating that hazard.⁵¹ This policy is apparent from RCW 81.53.100,⁵² RCW 81.53.110,⁵³ and RCW 81.53.271(1).⁵⁴ The railroad should be responsible (within limitations of RCW 81.53.271 and .275) for making any changes necessary to reduce or eliminate the resulting danger.

It also appears that the proponents’ share of installing gates and lights at both Hickox and Stackpole, plus median barriers at Hickox, would not be substantially greater than what the proponents had already proposed to pay for (1) the installation of lights and gates at

⁵⁰ MacDonald, TR. 330:16-22.

⁵¹ Exh. No. 49, 5:8-7:2, Curl.

⁵² Whenever, under the provisions of this chapter, new railroads are constructed across existing highways, or highway changes are made either for the purpose of avoiding grade crossings on such new railroads, or for the purpose of crossing at a safer and more accessible point than otherwise available, the entire expense of crossing above or below the grade of the existing highway, or changing the route thereof, for the purpose mentioned in this section, shall be paid by the railroad company.

⁵³ Whenever, under the provisions of this chapter . . . and existing grade crossing is . . . changed (or the style or nature of construction of an existing crossing is changed), the entire expense of constructing a . . . safer grade crossing, or changing the nature and style of construction of an existing crossing . . . shall be apportioned by the commission between the railroad, municipality or county affected, or if the highway is a state road or parkway, between the railroad and the state, in such manner as justice may require, regard being had for all facts relating to the establishment, reason for, and construction of said improvement.

⁵⁴ If the proposed installation [of signals or warning devices] is located at a new crossing requested by a railroad, then the entire cost shall be apportioned to the railroad.

Stackpole (\$150,000), (2) turnarounds on both sides of the closure (\$60,000 to \$100,000), (3) turning radius improvements at the corner of Stackpole and Dike, and Hickox and Dike (\$30,000), and (4) mitigation for the Fire District (unknown).

40 Because the Commission would not be ordering the closure of the crossing and the diversion of traffic to an alternate crossing, the road authorities would be responsible for any changes to their road network that they deem necessary (such as turnarounds and turning radius improvements). The Commission's authority under RCW 81.53.060 extends to prescribing road improvements necessary to safely divert traffic from a "closed" crossing to an alternative crossing. If, however, the Hickox Road crossing is not to be "closed" but is to remain open subject to a requirement of improved warning devices, then any road network changes necessary to deal with the impact of increased railroad operations (*i.e.*, frequent blocking of the Hickox crossing by trains) may be beyond the Commission's purview. WSDOT may choose to fund these as part of any mitigation necessary for its determination of non-significance under SEPA.

41 If the road authorities do not wish to commit their share of the necessary resources, then the fallback should be that the crossing would be ordered closed, on the condition that the proponents install gates and lights at the Stackpole crossing (without contribution from the road authorities), that the proponents provide funding to the City and County for turnarounds on both sides of the closure, turning radius improvements at the intersections of Hickox and Dike Road, and Stackpole and Dike Road. Although Mr. Norris's SEPA analysis, on behalf of WSDOT, also recommended that WSDOT provide some form of mitigation to the Fire District for the anticipated impact on response time,⁵⁵ WSDOT has not spelled out what this would be. Fire District's suggestion of some \$600,000 for the

⁵⁵ Exh. No. 11, 23:25-26, Norris; Exh. No. 13, p. 51.

establishment of a sleeper program suffers from the fact that it is not properly scaled to the impact resulting from closure of Hickox crossing. The sleeper program would benefit not just the affected area, but the entire area for which the Cedardale station has primary responsibility. While it might be possible to “prorate” the \$600,000 amount—based on the number of residences and businesses that are located within the “affected area,” as a percentage of all residence and businesses served from the Cedardale station—it seems doubtful that the District would have the wherewithal to put the program in place, unless it received the full \$600,000 as a result of this process. One other possible form of mitigation could be for WSDOT to fund the extension of a high-pressure hydrant from the Old Highway 99-side of the railroad to the west side. In any event, the Commission need not order specific mitigation for the District. WSDOT is the lead SEPA agency for the siding extension project; and it is fair to assume that WSDOT will honor the finding of its consultant’s SEPA analysis, and provide some appropriate mitigation to the District.

42

At the cross-examination hearing, counsel for the railroad asked various witnesses about whether the flood-related needs for the crossing could be met if the crossing were converted to a private crossing with a locked gate that could be opened in the event of emergent need. Staff believes that the proposal simply was not developed enough on the record for the Commission to order this result. The proposal was not described or even mentioned in any of the proponent’s witnesses’ direct testimony. Many important questions remain unanswered. Under what circumstances would it be permissible to open the gate? If the crossing were available for flood evacuation, what would qualify as such? Would the crossing be available for evacuation of livestock when there is some indication that a flood is imminent? Would the crossing be available for trucks carrying loads of rock for flood

fighting? Would the railroad provide a flagger at the crossing who is in radio contact with the railroad dispatcher, in order to be aware of the approach of trains (Staff's strong preference)? Staff believes that the emergency gate "proposal" may be a potential settlement alternative, but its details are too vague for the Commission to require as a condition of closure.

V. CONCLUSION.

43

For the foregoing reasons, the Commission should enter an order containing the findings and ordering the relief recommended by Staff in the summary section set out above.

DATED this 15th day of February, 2008.

ROBERT M. MCKENNA
Attorney General



JONATHAN C. THOMPSON
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff