

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY,)	DOCKET NO. TR-070696
Petitioner)	
)	JOINT RESPONSE TO
v.)	PETITIONER'S REQUEST TO FILE
)	SUPPLEMENT BRIEF
CITY OF MOUNT VERNON,)	
Respondent)	
And)	
SKAGIT COUNTY , WASHINGTON)	
STATE DEPARTMENT OF)	
TRANSPORTATION, WESTERN VALLEY)	
FARMS LLC, and FIRE DISTRICT NO. 3,)	
Intervenors)	

1 **NAME OF PLEADING PARTIES.** The City of Mount Vernon, Respondent; Skagit County, Intervenor, Western Valley Farms, LLC, Intervenor; Fire District No. 3 Intervenor (“the Parties”).

2 **INTRODUCTION AND AUTHORITY.** This matter comes before the Washington State Utilities and Transportation Commission (WUTC) to consider Petitioner’s request to abandon and close to public use a railroad-highway grade crossing located at Hickox Road, Mount Vernon. The WUTC convened an evidentiary hearing in which the Parties appeared and presented evidence in support of denying the closure. The Commission closed the hearing on February 1, 2008. The WUTC issued a *Notice of Deadlines*

Concerning Post-Hearing Briefs on January 14, 2008 which, in part, set forth post hearing brief deadlines and allowed for requests and responses to requests for responsive briefing.

3 The Parties respectfully submit the following response to Petitioner's request to file supplemental briefing based on the authority and argument herein respectfully requesting inclusion of those issues identified by the Parties should the Commission grant Petitioner's request .

I. RELIEF REQUESTED

4 The definitions found with RCW 81.53.010 include "highway", "railroad" and "grade crossing". RCW 81.53.020 requires railroads and extensions of railroads (a definition including "sidings") "hereafter constructed" (1913 c. 30 § 2; RRS 10512 formerly RCW 81.52.090) to pass either over or under existing highways. The creation of a new rail siding crossing an existing highway at any point or any place creates a new at grade crossing and can only be allowed if BNSF petitions WUTC under RCW 81.53.030.

5 The Parties do not object to Petitioner's request to file supplemental briefing on condition that the Commission permits responsive briefing of the authority which controls the Commission's decision and the extent of the Commission's authority to act without a petition under RCW 91.53.030. If the Commission grants Petitioner's request, the Parties request supplemental briefing the directly related unforeseen issues of law introduced in post hearing briefing identified in this response.

II. STATEMENT OF FACTS

6 Petitioner BNSF has filed a request for supplemental briefing on the issue on whether RCW 81.53.030 should be applied to the Petitioner's request to close an existing crossing when their proposal calls for adding a siding that crosses Hickox Road, an existing highway.¹ Related to this matter, WUTC staff in its analysis filed with the Commission in its post hearing brief introduced an unforeseen argument that the Commission cannot deny or direct the construction of the siding when the construction of the siding results in crossing an existing highway.² Moreover, WUTC staff in its analysis introduced an unforeseen argument that the Commission is entitled to apportion costs to the affected local jurisdictions in order to mitigate for public safety impacts caused by the project in order to allow the existing crossing to remain open.³

III. STATEMENT OF ISSUES

7 **Issue one:** Is RCW 81.53.030, which explicitly allows the Commission to either grant or deny the right to construct a grade crossing at the point in question when such a crossing is proposed, pre-empted by the Interstate Commerce Commission Termination Act (ICCTA) when such authority over grade crossings of state roads was long ago reserved by the Washington State Legislature under its traditional use of its police powers reserved by the Federal Constitution to regulate public safety of highway crossings?

¹ See *Petitioner's For Supplemental Briefing* at pp 2

² See *WUTC Staff Post-Hearing Brief* at pp 5 through 10.

³ See *WUTC Staff Post-Hearing Brief* at pp. 20

8 **Issue two:** Under RCW 81.53.100-RCW 81.53.130, does the Commission have authority to apportion costs between the railroad and the local jurisdictions affected for improvement needed to mitigate impacts to public safety when those impacts are solely caused by the construction of a new railroad as defined by RCW 81.53.010 across an existing highway?

V. ARGUMENT

9 Petitioner seeks supplemental briefing about whether the Petitioner correctly filed for crossing closure under RCW 81.53.060. RCW 81.53.030 requires that the WUTC enter a written order either granting or denying the right to construct a grade crossing at the point in question if an under-crossing or over-crossing is not practical. ⁴ Petitioner states in its request that “there is no case law or statutory support for the argument”⁵ despite Parties citation to: the plain and unambiguous language found within the definitions set forth in RCW 81.53.010, the mandatory language found with RCW 81.53.030, case law involving rules of statutory construction, the Supreme Court holding in Toppenish which involves a similar attempt to avoid a petition for a new crossing by arguing that relief sought through the closure statutes, and arguments based on policy.⁶ Depending on the outcome this issue, different

⁴ See *Petitioner’s Request for Supplemental Brief* at pp 3.

⁵ See *Petitioner’s Request for Supplemental Brief* at pp 4..

⁶ See *Parties Joint Post-Hearing Brief* at pp 6 (citing definitions RCW 81.53.010); pp 7 (citation mandatory language of RCW 51.53.030); pp. 10 (citing the Supreme Court holding in State ex. rel. City of Toppenish v. Public Service Commission, 114 Wash. 301, 309, 194 P. 982 (1921), pp. 12-14 citing policy for duty to mitigate should be borne by the party causing the harm.

statutes may apply on whether the Commission may apportion the costs for constructing the necessary public safety improvements.⁷

10 Related to this issue, WUTC staff raised new issues of whether the Commission is able to deny or direct the construction of the siding when the construction of the siding results in crossing an existing highway. This directly involves the applicability of RCW 81.53.030 as WUTC staff's position is contrary to the explicit authority reserved by the State Legislature exercising its traditional police powers set forth in RCW 81.53.030 which grants the Commission the authority to grant or deny a new crossing for public safety reasons. The Parties believe that such reservation of powers for preserving public safety for *at grade crossings* is not pre-empted by federal authority, that case law and legislative history of the ICCTA supports such an interpretation and that case law cited by WUTC staff is distinguishable on its facts. Accordingly, should the Commission believe further briefing is needed for Petitioner's unsupported position that construction of a new rail line across an existing highway does not for some reason result in a new crossing of that highway, the Parties would request to include in such supplemental briefing the related issues described above.

IV. CONCLUSION

⁷ See RCW 81.53.100 (costs when a railroad crosses a highway); See also RCW 81.53.130 ("In the construction of new railroads across existing highways, the railroads shall do or cause to be done all the work of constructing the crossings and road changes that may be required, and shall acquire and furnish whatever property or easements may be necessary, and shall pay, as provided in RCW 81.53.100 through 81.53.120, the entire expense of such work including all compensation or damages for property or property rights taken, damaged or injuriously affected.")

11

The statutory framework set forth in RCW 81.53 includes plain and unambiguous definitions which state that a new grade crossing occurs whenever a railroad (explicitly including sidings) crosses an existing highway at any point or any place. Accordingly, projects such as Petitioner's 'siding' project, when not above or below grade, are subject to a Commission's written order under RCW 81.53.030 either granting or denying the right to construct a grade crossing at the point in question. This was clearly contemplated when the legislature adopted RCW 81.53.020, RCW 81.53.030 and such inclusive definitions. Petitioner seeks permission to create a new hazard by adding a new grade crossing to Hickok Road in the form of a siding and such facts before the Commission are definitive to ruling against Petitioner's request for closure. Should the Commission decide further briefing on the matter is warranted, the Parties ask that briefing include all matters related to the issue at hand including cost apportionment and pre-emption.

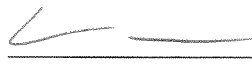
1 Respectfully Submitted this 26th day of February, 2008



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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 26, 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 *JOINT RESPONSE TO PETITIONER'S REQUEST TO FILE SUPPLEMENTAL BRIEF* with attached *DECLARATION OF SERVICE* on the following:

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