

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

BNSF RAILWAY COMPANY,)	
)	DOCKET TR-070696
)	
Petitioner,)	ORDER 05
)	
v.)	
)	INITIAL ORDER GRANTING
CITY OF MOUNT VERNON,)	PETITION TO CLOSE HICKOX
)	ROAD GRADE CROSSING
Respondent.)	SUBJECT TO CONDITIONS
)	
.....)	

Synopsis: This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. This Order recommends granting a petition by Burlington Northern Santa Fe Railway Company to close the Hickox Road at-grade railroad crossing in the City of Mount Vernon, Skagit County, subject to conditions. One condition requires safety upgrades to the Stackpole Road at-grade railroad crossing, located immediately to the south of the existing Hickox Road crossing. A second condition requires BNSF to continue to operate and maintain all safety features currently in place at the Hickox Road crossing. A third condition requires BNSF to fund necessary road improvements associated with closure of the crossing. A final condition mandates conversion of the current public crossing into a private crossing for (a) emergency use by local governmental entities, to include the City of Mount Vernon, Skagit County, and Skagit County Fire Protection District No. 3 and (b) limited seasonal commercial use by Western Valley Farms, LLC.

I. INTRODUCTION

1 **NATURE OF PROCEEDING.** Docket TR-070696 involves a petition by Burlington Northern Santa Fe Railway Company (BNSF or Burlington Northern) to abandon and close to public use a railroad-highway grade crossing located at Hickox Road, Mount Vernon, Skagit County, Washington (US DOT #084737D) in accordance with Revised Code of Washington (RCW) 81.53.060.

2 **Appearances.** Bradley Scarp and Kelsey Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represent Burlington Northern. Kevin Rogerson, City Attorney, Mount Vernon, Washington, represents the City of Mount Vernon (Mount Vernon or the City). Stephen Fallquist, Civil Deputy Prosecuting Attorney, Mount Vernon, Washington, represents Skagit County (County). Scott Lockwood, Assistant Attorney General, Olympia, Washington, represents the Freight Systems Division of the Washington State Department of Transportation (WSDOT), Tumwater, Washington. Thomas Burke, Burke Law Offices Inc., P.S., and Brian Snure, Snure Law Office, PSC, both of Des Moines, Washington, represent Skagit County Fire Protection District No. 3 (Fire District No. 3), Conway, Washington. Gary T. Jones, Jones & Smith, Mount Vernon, Washington, represents David Boon, Yvonne Boon, and Western Valley Farms, LLC (Western Valley Farms). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).

3 **Procedural History.** BNSF initially filed its petition to close the Hickox Road at-grade railroad crossing in Skagit County on April 11, 2007, and the Commission set the matter for hearing. At a prehearing conference held on July 13, 2007, Administrative Law Judge (ALJ) Adam E. Torem ruled on petitions for intervention and the parties discussed the scope of issues to be presented at hearing.¹ At a second prehearing conference held on August 1, 2007, Judge Torem slightly modified the scope of relevant issues and the parties agreed to a procedural schedule calling for evidentiary and public hearings to take place in January 2008.²

4 In the interest of efficiency, the parties aligned themselves into groups with regard to the petition seeking closure of the Hickox Road crossing: proponents (BNSF and WSDOT) and opponents (City of Mount Vernon, Skagit County, Western Valley Farms, and Fire District No. 3). Commission Staff was not aligned with either group.

5 The Commission conducted an evidentiary hearing before Judge Torem upon due and proper notice to all interested parties on January 8, 9, and 10, 2008, in Mount Vernon,

¹ Order 01.

² Order 02. In August and September 2007, the BNSF and the City of Mount Vernon filed competing motions again addressing the scope of relevant issues. Judge Torem denied both motions in Order 03.

Washington; in order to accommodate witness availability issues, Judge Torem completed the evidentiary hearing on January 31, 2008, in Seattle, Washington. The parties submitted 140 exhibits during the course of the evidentiary hearing.

- 6 The Commission also held two public comment hearings, one on the afternoon of January 8, 2008, and the other on the evening of January 9, 2008. Judge Torem conducted both public hearings in Mount Vernon, Washington. In addition, the Commission accepted written and electronic public comment on the matter from the date of initial filing, April 11, 2007, through February 1, 2008. The Commission received comments and petitions from over 200 persons, all but one opposing closure of the Hickox Road crossing.
- 7 On February 15, 2008, the parties submitted their post-hearing briefs. On February 22, 2008, BNSF filed a Request to File Supplemental Brief offering additional legal analysis on an issue raised in the opponents' post-hearing brief. On February 26, 2008, the opponents filed a Joint Response to BNSF's Request. On February 27, 2008, the Commission issued a notice declining supplemental briefing, effectively closing the record in this matter as of that date.
- 8 **Initial Order:** The presiding Administrative Law Judge proposes that the Commission grant Burlington Northern's petition to close the Hickox Road at-grade railroad crossing in the City of Mount Vernon, Skagit County, to public use, but only subject to the conditions that (1) BNSF upgrade the Stackpole Road at-grade crossing with safety measures equivalent to those now in place at the Hickox Road crossing; (2) BNSF continue to maintain and operate the safety features now in place at the Hickox Road crossing; (3) BNSF provide funding for necessary road improvements associated with the closure of the Hickox Road crossing; and (4) BNSF negotiate and separately enter into two private crossing agreements for limited continued use of the Hickox Road grade crossing, the first with the local governmental entities party to this case (City of Mount Vernon, Skagit County, and Skagit County Fire District No. 3) in order to accommodate response to emergencies affecting the health, safety, and welfare of the surrounding communities, and the second with Western Valley Farms in order to accommodate the seasonal harvesting and related cross-highway transportation of its corn or other feed crops.

II. BACKGROUND

9 Skagit County is located in the northwest portion of Washington State, approximately 60 miles north of Seattle and 80 miles south of Vancouver, British Columbia, Canada. The City of Mount Vernon, with a population of approximately 30,000, is the county's largest municipality and serves as the county seat.

10 Burlington Northern runs a main line track, as well as various side tracks, north and south through Skagit County and the City of Mount Vernon. There are several roads running east and west that cross the BNSF line as it runs northbound from the county's unincorporated area and into the City of Mount Vernon. As pertinent to this matter, these include Stackpole Road, Hickox Road, and Blackburn Road.³

11 In accordance with RCW 47.79 and RCW 47.82, Amtrak Cascades is seeking to improve intercity rail service by creation of a high speed rail corridor between Eugene, Oregon, and Vancouver, British Columbia, Canada.⁴ As part of this plan, WSDOT has accomplished a series of capital improvements to existing railway infrastructure in this corridor, including the extension of existing sidings to allow more opportunities for trains to meet and pass along BNSF's main line.⁵ As relevant to this case, WSDOT is planning to extend the existing Mount Vernon siding from a length of roughly 6,000 feet to over 10,000 feet.⁶ The lengthened siding will add a second set of tracks to the existing grade crossing at Hickox Road. Therefore, citing the interests of safety, redundancy, and improved passenger operations, BNSF seeks permission to close the Hickox Road grade crossing.⁷

12 The Hickox Road grade crossing is located in a rural area adjacent to the boundary limits of Mount Vernon and is surrounded by open farm fields, barns, and some rural homes. To the east, both Interstate 5 (I-5) and Old Highway 99 run approximately

³ Exh. Nos. 55, 59, and 65 consist of aerial photographs that provides a generalized overview of the relevant areas, each individually labeled with the location of one of these roadways.

⁴ Exh. No. 10.

⁵ Schultz, Exh. No. 8, 6:11 - 8:2 and Exh. No. 10, Chapter 5; *see also* Gordon, Exh. No. 1, 3:1-4, and McIntyre, Exh. No. 2, 3:14-22 (explaining typical purpose and use of siding track).

⁶ Schultz, Exh. No. 8, 9:19 - 10:5; *see also* Schultz, TR. 496:4 - 497:1.

parallel to the BNSF main line; to the west are the Skagit River and Dike Road. In its current configuration, the active safety features at the Hickox Road grade crossing include flashing light signals, automatic gates, and warning bells; passive safety features include a yellow highway-rail grade crossing advance warning sign and a white “crossbuck” highway-rail grade crossing sign on each side of the tracks.⁸

- 13 The closest alternate crossing to Hickox Road is located at Stackpole Road, approximately 1 mile to the south. The Stackpole Road grade crossing is in a rural area outside of city limits and is surrounded by open farm fields. In its current configuration, it has no active safety features, but only passive safety features: stop signs and white “crossbuck” signs on each side of the tracks.⁹ In BNSF’s request to close the Hickox Road crossing, it pledged to upgrade the Stackpole Road crossing to include active safety features at the same level currently in use at Hickox Road.¹⁰
- 14 The closest alternate crossing to the north of Hickox Road is located at Blackburn Road, approximately 1.5 miles to the north. The Blackburn Road grade crossing is within the City of Mount Vernon and is a more complex crossing than either Hickox Road or Stackpole Road because it consists of two sets of tracks and is situated at the intersection of several roads.¹¹ Active safety features at the Blackburn Road crossing include cantilevered flashing light signals, automatic gates, warning bells, and traffic signals interconnected for preemption by the automatic railway gates.¹² There are also numerous passive safety features at this crossing: yellow advance warning signs

⁷ Petition for the Abandonment and Closure of a Highway-Rail Grade Crossing at Hickox Road (April 11, 2007), ¶ 3 (“redundancy” refers to BNSF’s contention that the Hickox Road crossing is unnecessary because of the existence of alternate crossings with a reasonable distance nearby).

⁸ Exh. Nos. 57-58 and Exh. No. 20 (as explained in Bell, Exh. No. 18, 2:14 - 6:17) consist of various photographs and images that provide multiple views of the Hickox Road crossing; *see also* Johnston, Exh. No. 52, 8:7-17.

⁹ Exh. Nos. 53-56 and Exh. No. 21 (as explained in Bell, Exh. No. 18, 6:22 - 8:9) consist of various photographs and images that provide multiple views of the Stackpole Road crossing; *see also* Johnston, Exh. No. 52, 7:21 - 8:6.

¹⁰ Petition, ¶ 3.1.

¹¹ *See* Zeinz, Exh. No. 50, 9:22 and 10:2-16 (describing “unusual and complex roadway geometrics” at Blackburn Road crossing where two of the four roadway approaches “cross the tracks at a skewed angle”); *see also* Exh. No. 66 (aerial view of Blackburn crossing).

¹² When an oncoming train triggers the railway crossing’s active safety features (lights and gates), the normal cycle of the traffic lights is preempted such that in addition to the lowered railway gates, red traffic lights are displayed to all automotive traffic approaching the tracks.

and white “crossbuck” signs on each side of the tracks, supplemental traffic control signage indicating where drivers should stop when presented with a red traffic light and warning drivers not to stop on the tracks, as well as painted pavement markers in advance of the intersection.¹³

- 15 The Mount Vernon Christian School is located approximately ½ mile west of the Blackburn Road crossing. This school has an enrollment of about 330 students of various ages and offers grades ranging from primary through high school.¹⁴
- 16 Portions of Skagit County, including portions of the City of Mount Vernon, are subject to seasonal flooding.¹⁵ The area west of the Hickox Road crossing is generally within a designated floodplain and protected from the Skagit River by a raised dike system.¹⁶ The County’s primary source of rock and gravel for its flood fighting actions is located approximately 1.2 miles east of the Hickox Road crossing, across an interchange with I-5 and then at the easternmost terminus of Hickox Road.¹⁷
- 17 The area of Mount Vernon closest to the Hickox Road crossing is designated for commercial and limited industrial uses.¹⁸ Existing and developing businesses include recreational vehicle (RV) sales, a biomedical laboratory, and construction material sales.¹⁹ These southernmost Mount Vernon city limits also include sparse residential development to the northwest of the Hickox Road crossing (in the areas along Britt Road and Dike Road) and additional commercial developments line Old Highway 99 northward to Blackburn Road.²⁰ I-5 bisects Hickox Road, but the interchange at

¹³ Exh. Nos. 61-66 and Exh. No. 22 (as explained in Bell, Exh. No. 18, 8:11 - 10:27) consist of various photographs and images that provide multiple views of the Blackburn Road crossing, including views from 2nd Avenue and from Old Highway 99; *see also* Johnston, Exh. No. 52, 8:18 - 9:15.

¹⁴ DeJong, Exh. No. 79, pg. 1 (question 3).

¹⁵ Watkinson, Exh. No. 35, 2:22 - 3:32 and Boge, Exh. No. 41, 2:22-27; *see also* Exh. Nos. 38, 39, 44, and 45; *see also* B. Norris, Exh. No. 28, 5:1 - 6:5, Love, Exh. No. 29, 5:9-13, and Smith, Exh. No. 77, pp. 2-4 (questions 5, 6, and 7).

¹⁶ Boge, Exh. No. 41, 4:55-59; *see also* Liou, Exh. No. 16, 5:24 - 6:23 and Exh. Nos. 48, 117, and 119.

¹⁷ Love, Exh. No. 29, 7:28 - 8:2 and 9:8-11; *see also* Brautaset, Exh. No. 23, 6:21-28.

¹⁸ Hanson, Exh. No. 31, 5:30 - 6:8.

¹⁹ *Id.*, at 6:21-23; *see also* Hanson, TR. 1031:23 - 1034:11.

²⁰ Exh. Nos. 55, 59, or 65 provide very informative overhead views of the entire area.

Exit 224 is more directly aligned to connect with Old Highway 99; Exit 225 from I-5 is approximately 1 mile to the north, at Anderson Road.²¹

III. EVIDENCE

A. Proponents – Burlington Northern and WSDOT.

18 The Federal Railroad Administration (FRA) recommends “the first alternative that should always be considered for a highway-rail at-grade crossing is elimination.”²² In 2000, BNSF instituted a program to close what it considers to be unnecessary highway-rail grade crossings.²³ BNSF and WSDOT presented testimony and exhibits that demonstrated the public safety concerns motivating the State and railway to seek closure of the Hickox Road grade crossing.

19 WSDOT witness Jeff Schultz explained the primary purpose of the Mount Vernon Siding Extension Project is to allow freight trains of up to approximately 10,000 feet (nearly 2 miles) in length to pull off the BNSF main line in order to meet and pass Amtrak’s passenger trains.²⁴ These freight trains would typically pause on the siding for periods of time ranging from five to ten minutes to meet and pass a passenger train, but in some circumstances could remain parked, blocking the Hickox Road crossing, for up to several hours to meet and pass another freight train.²⁵

20 BNSF witness Danniell MacDonald, Manager Engineering, explained that when trains block the Hickox Road crossing for extended periods, the active warning devices (flashing lights, bells, and gates) would remain active and effectively close the crossing for the full length of time needed for the trains to meet and pass.²⁶ He predicted that as drivers come to know that they may be delayed for long periods of time, they might try to “beat the train” when they observe the warning devices

²¹ *Id.* See also Curl, TR. 902:1-25 (discussing predominantly local traffic making use of Hickox Road, despite its proximity to a freeway interchange). See also Exh. No. 150 (driving “tour” route utilized by Judge Torem to view involved crossings and potentially affected areas).

²² Exh. No. 101, at 76; see also Exh. No. 101 at 5, 6-11, 75-82, and 150-51.

²³ Peterson, Exh. No. 5 (revised), 3:8-18; see also Exh. No. 101, at 80-81.

²⁴ Schultz, Exh. No. 8, at 10:14 - 13:15.

²⁵ See Schultz, TR. 488:17 - 491:5; see also MacDonald, TR. 338:1 - 339:10.

²⁶ MacDonald, Exh. No. 7, at 3:1-22; see also MacDonald, TR. 330:24 - 333:3.

activate prior to a train's arrival at the crossing.²⁷ Mr. Schultz echoed these safety concerns, explaining at hearing that four Amtrak trains already meet and pass on the existing siding north of the Hickox Road location daily.²⁸

- 21 BNSF witness Foster Peterson, a railroad consultant, testified that grade crossings intersecting both a main line and siding track create particular safety hazards, including the potential that people, confused by trains stopped on a siding, might attempt to drive around the lowered gates only to be hit by an oncoming train on the main line.²⁹ He also acknowledged the Commission's rules against trains blocking crossings for more than 10 minutes and then generally explained the difficulties involved in "splitting" trains that are only waiting to continue their journey, not stopping or parking.³⁰ In Mr. Peterson's judgment, the best option to mitigate the dangers created by the siding extension project would be to close the Hickox Road crossing and upgrade the safety features at the Stackpole Road crossing.³¹
- 22 BNSF witness Megan McIntyre, the railway's Manager of Public Projects for Washington, noted that daily train traffic through Mount Vernon consists of 4 Amtrak passenger trains and approximately a dozen freight trains.³² She then explained that freight trains parked on the new siding to the north of the Hickox Road crossing would create a visibility hazard for cars and pedestrians at the crossing, preventing a clear view of trains running southbound on the mainline.³³ She contended that activation of the crossing's warning lights, bells and gates by a train that remained parked on the crossing but did not enter or block the crossing would not only reduce northward visibility, but also cause confusion for drivers and pedestrians, potentially tempting them to go around the lowered gates and across both sets of tracks.³⁴ BNSF

²⁷ MacDonald, Exh. No. 7, at 3:1-22; *see also* MacDonald, TR, 303:21 - 304:15 and 315:19 - 316:21 and 323:15 - 329:15.

²⁸ Schultz, Exh. No. 8, 16:15 - 17:8; *see also* Schultz, TR, 505:22 - 506:13.

²⁹ Peterson, Exh. No. 5 (revised), 4:7-18.

³⁰ *Id.*, 5:1-13. WAC 480-62-220(1) states that "railroad companies must not block a grade crossing for more than ten consecutive minutes, if reasonably possible." *See also* Gordon, Exh. No. 1, 4:24 - 5:8; *see also* McIntyre, Exh. No. 2, 6:13 - 7:20.

³¹ *Id.*, 5:22 - 6:8 and Peterson (rebuttal), Exh. No. 92, 2:6-17 and 4:17 - 5:19. *See also* Peterson, TR., 592:10 - 601:18 and 629:4 - 630:12.

³² McIntyre, Exh. No. 2, 3:9-12.

³³ *Id.*, 3:14 - 4:6.

³⁴ *Id.*, 4:19 - 6:11.

witness Stuart Gordon, the railway's Assistant Terminal Superintendent for Everett, Washington, echoed these concerns.³⁵ Finally, Ms. McIntyre explained how some drivers will ignore railway crossing safety signals and drive around lowered gates.³⁶

23 WSDOT witness Gary Norris, a Senior Project Manager for Garry Struthers Associates, Inc., testified about the traffic impact analysis (traffic study) he conducted in January 2007 to evaluate the potential traffic impacts of closing the Hickox Road at-grade crossing.³⁷ The study was based on data collected in early February 2006.³⁸

24 The traffic study found average weekday traffic volume to be 340 vehicles on Hickox Road.³⁹ If the Hickox Road crossing is closed, the study predicts that the majority of this traffic would be diverted to Stackpole Road,⁴⁰ with only a single peak-hour trip diverting to cross the railway line at Blackburn Road.⁴¹

25 Initially, the traffic study considered only closure and the "no action" alternative. However, Mr. Norris explained that he later analyzed 3 other options: realigning Hickox Road for a crossing south of the proposed siding, widening the existing crossing to accommodate the siding, or moving the proposed siding to a different location further south.⁴²

26 Upon review of all the data, Mr. Norris concluded that closure of the Hickox Road crossing would not result in any significant impact on traffic at either the Stackpole or Blackburn crossing intersections.⁴³ Upon being questioned about the closure of the Hickox Road crossing potentially making the Blackburn Road crossing more congested, Mr. Norris stated:

³⁵ Gordon, Exh. No. 1, 2:12 - 4:22; *see also* Exh. No. 95 and Exh. No. 108.

³⁶ *See* Exh. No. 4 (admitted at hearing for illustrative purposes only).

³⁷ *See* G. Norris, Exh. No. 11, G. Norris (rebuttal), Exh. No. 15, and Exh. No. 13 (Hickox Road Railway Crossing Closure Traffic Impact Analysis, January 2007).

³⁸ *See* G. Norris, Exh. No. 11, 6:13-25; *see also* Exh. No. 13, at 8. *See also* G. Norris (rebuttal), Exh. No. 15, 4:23 - 5:19 (addressing representativeness of trip data collected in winter season).

³⁹ G. Norris, Exh. No. 11, 10:13 - 11:8; *see also* Exh. No. 13, at 8.

⁴⁰ G. Norris, Exh. No. 11, 16:15 - 17:3; *see also* G. Norris (rebuttal), Exh. No. 15, 2:13-14.

⁴¹ G. Norris (rebuttal), Exh. No. 15, 2:1-14. *See also* G. Norris, TR. 784:10 - 787:16.

⁴² G. Norris, Exh. No. 11, 5:13 - 6:5. *See also* Exh. No. 13, at 52-56.

⁴³ G. Norris, Exh. No. 11, 23:6-20.

I'd like to make one point, though, in regards to the volume here, just to give you a sense of the magnitude of what we're talking about. If all of the traffic that we're talking about on Hickox Road today, which is roughly 370 daily cars, were to divert to Blackburn Road, they would not even be detectable within the percentage of accuracy of the traffic count equipment we use. So to make a big discussion about the impact here, it's not going to be detectable.⁴⁴

Thus, in sum, Mr. Norris took the position that because so few cars now use the Hickox Road crossing on an average day, diverting their trips elsewhere amounts to a negligible impact, particularly at the Blackburn Road crossing.

27 The traffic study did note that response time for Fire District No. 3 will be increased by approximately 7 minutes.⁴⁵ Even so, Mr. Norris recommends closure of the crossing as the best available alternative, with further recommendations for various intersection radii enlargements to better accommodate the turning radius of diverted farm equipment and for WSDOT to work with Fire District No. 3 to mitigate the impacts on response time.⁴⁶

28 Mr. Peterson reviewed Mr. Norris' traffic study, visited the Hickox Road crossing, and observed alternate crossings in the area before forming his opinion that "the Hickox Road crossing should be closed upon completion of the Mount Vernon siding project."⁴⁷ Further, Mr. Norris disagrees that four-quadrant gates would solve the safety concerns presented by adding a siding across Hickox Road because of the danger of drivers familiar with the delays inherent at the new crossing configuration trying to "beat the train" or go around lowered gates.⁴⁸ In his opinion, the fact that

⁴⁴ G. Norris, TR. 751:23 - 752:7; *see also* G. Norris, TR. 785:17 - 786:4 ("... we have to go back to what I mentioned previously, that the volume of traffic we're talking about here is 32 trips in the peak hour, which is virtually undetectable in the traffic count equipment that we're using.").

⁴⁵ G. Norris, Exh. No. 11, 17:3-15, 23:13-14 and 24:3-9. *See also* G. Norris (rebuttal), Exh. No. 15, 7:1-24. *See also* Exh. No. 13, at 48 and 61 and at Exh. No. D.

⁴⁶ *See* G. Norris (rebuttal), Exh. No. 15, 6:16-20; *see also* G. Norris, Exh. No. 11, 23:21 - 24:9.

⁴⁷ Peterson, Exh. No. 5 (revised), 5:22 - 6:12.

⁴⁸ Peterson (rebuttal), Exh. No. 92, 5:10 - 7:13; *see also* Peterson, TR. 614:14 - 619:24 (discussing ability of drivers to defeat protections offered by four quadrant gates by breaking gate arms or taking advantage of vehicle presence detection systems on "exit" gates).

trains will regularly block the crossing for appreciable lengths of time mandates its closure.⁴⁹

B. Opponents – City of Mount Vernon, Skagit County, Skagit County Fire Protection District No. 3, and Western Valley Farms.

29 *City of Mount Vernon.* The City of Mount Vernon presented testimony from its public works staff, assistant fire chief, economic development director, a hydrologic engineer, and the mayor. All were opposed to closing the crossing on grounds that diverted traffic would negatively impact Blackburn Road, the Hickox Road crossing is expected to play a key role in future economic development of the area, and Hickox Road already serves as an integral part of the city’s flood fight and evacuation plans.

30 “Esco” Bell, Public Works Director, testified generally about the characteristics and configurations of the railway intersections at Stackpole, Hickox, and Blackburn roads.⁵⁰ Mr. Bell asserted that the Blackburn Road crossing, already a busy intersection, will see its level of service severely degraded due to population growth expected by 2025.⁵¹ He also contended that the Hickox Road crossing will be important to the City as expected commercial and industrial growth occurs along Old Highway 99 north of the I-5 interchange.⁵²

31 Jana Hanson, Director of the Community and Economic Development Department, echoed Mr. Bell’s concerns, but instead of focusing on traffic, generally explained the City’s future development constraints along its southern urban growth boundary.⁵³

32 Albert Liou, a hydrologic engineer, has studied the Skagit River’s flows and floods since early 2002.⁵⁴ He pointed out that although the BNSF tracks are raised to an elevation of 18 feet at the Hickox Road crossing, the surrounding land is 10 feet

⁴⁹ See Peterson, TR. 592:10 - 594:16; *see also* Peterson (rebuttal), Exh. No. 92, 7:12-13.

⁵⁰ Bell, Exh. No. 18, 2:14 - 10:27. Exh. Nos. 20-22 contain Mr. Bell’s photographs of each crossing.

⁵¹ *Id.*, 11:4-17.

⁵² *Id.*, 12:27 to 13:16.

⁵³ Hanson, Exh. No. 31.

⁵⁴ Liou, Exh. No. 16, 1:22 - 3:9; *see also* Exh. No. 17. Mr. Liou was not cross-examined at hearing; his testimony was admitted by stipulation. *See* TR. 1137:24 - 1138:14.

lower.⁵⁵ Mr. Liou's analysis suggests that a 100-year flood could bring surface water levels to a height of 17 feet, particularly if a levee fails along the Skagit River.⁵⁶ In his opinion, the existing dikes hemming in this part of the river only provide flood protection up to a 25- or 50-year event, with surface water levels several feet lower than the 100-year flood.⁵⁷ Mr. Liou also estimated that in the case of a nearby dike failure, water would reach the Hickox Road crossing within 10 to 20 minutes.⁵⁸

33 Mikael Love, Assistant Public Works Director and Operations Section Chief during emergency flood operations, observed a November 1995 flooding event and was directly involved in "flood fight" actions in October 2003 and November 2006.⁵⁹ He noted that effective sandbagging operations depend on timely deployment of sand, bags, and volunteers.⁶⁰ Mr. Love pointed out that the City's primary source of materials for sandbagging and levee repair is located at the eastern terminus of Hickox Road. He then explained his worries that closing the Hickox Road crossing eliminates not only a route for rock delivery to close a breach in the dike system, but also a potential evacuation route.⁶¹ Nevertheless, Mr. Love acknowledged that a locked gate that authorities could open for flood fighting or evacuation purposes might alleviate his concerns, but only if the key to the gate could be dependably located in an emergency situation.⁶²

34 Glenn Brautaset, Assistant Fire Chief, reiterated Mr. Love's concerns about the City's need to retain its abilities and readiness options to respond to flood-related emergencies.⁶³ He explained that Kincaid Road and Blackburn Road are the City's pre-designated priority routes for incoming materials to fight any flood, noting that Hickox Road serves as an important alternate route for flood fight in case of traffic congestion or water over the primary routes; in addition, it could possibly serve as an

⁵⁵ Liou, Exh. No. 16, 5:7-11.

⁵⁶ *Id.*, 5:12-13.

⁵⁷ *Id.*, 6:15-29.

⁵⁸ *Id.*, 7:1-14.

⁵⁹ Love, Exh. No. 29, 1:22 - 4:10.

⁶⁰ *Id.*, 6:29 - 7:26.

⁶¹ *Id.*, 9:4-19.

⁶² Love, TR. 522:8 - 523:6.

⁶³ Brautaset, Exh. No. 23, 1:22 - 6:5.

evacuation route, as could every other east-west road in the region.⁶⁴ At hearing, Mr. Brautaset accepted that a gated private crossing for emergency access, if timely and appropriately opened, could allow Hickox Road to continue to serve its current purpose in the City's emergency response plans.⁶⁵

35 Mount Vernon Mayor Bud Norris testified generally about problems that closing the Hickox Road crossing would cause in the City's flood incident response abilities.⁶⁶

36 *Skagit County*. Skagit County presented testimony from its emergency management director and its surface water manager. Both were opposed to closure of the Hickox Road crossing based on concerns for sufficient access to the area for flood fight operations as well as alternate routes for flood evacuation. However, both witnesses agreed that establishing a gated private crossing would address and alleviate the majority of their concerns.

37 Mark Watkinson, Coordinator for Skagit County's Department of Emergency Management, pointed out that, on average, Skagit County has experienced flooding once every two years since 1975.⁶⁷ Given these regular threats from the river, he argued that Hickox Road, despite not being a designated flood evacuation route itself, was crucial in providing access to I-5 and other designated evacuation routes.⁶⁸ At hearing, Mr. Watkinson agreed that a gated private crossing would be a satisfactory option for flood evacuations that could be anticipated, but would not resolve issues related to sudden breaks in a dike or levee system.⁶⁹

⁶⁴ *Id.*, 6:7 - 9:8 and 12:18 - 13:16. See also Exh. No. 26 (flood evacuation map, explained by Brautaset at TR. 1003:21 - 1007:24) and Exh. No. 27 (flood fight elements map). Mr. Brautaset acknowledged at hearing that Hickox Road is not a formally designated evacuation route. See Brautaset, TR. 988:3 - 989:14.

⁶⁵ See Brautaset, TR. 991:14 - 995:8, 1012:15 - 1017:4, and 1020:3 - 1021:13 (referring to 1017:10-22).

⁶⁶ B. Norris, Exh. No. 28. Mayor Norris was not cross-examined at hearing; his testimony was admitted by stipulation. See TR. 861:23 - 862:7 and 973:18 - 974:5.

⁶⁷ Watkinson, Exh. No. 35, 2:22-27.

⁶⁸ *Id.*, 4:62 - 5:100.

⁶⁹ See Watkinson, TR. 1060:20 - 1061:16, 1063:4-21, and 1065:11 - 1066:1; see also Boge, TR. 1070:17 - 1072:5.

- 38 Ric Boge, Surface Water Manager for Skagit County's Public Works Department, testified that the area around the Hickox Road crossing last flooded almost six decades ago, in February 1951, the result of a levee failure just south of the town of Conway.⁷⁰ Mr. Boge testified generally about the age and fragility of the levee system along the Skagit River and noted that the Federal Emergency Management Agency (FEMA) had not certified this levee system.⁷¹ Echoing Mr. Watkinson, he noted that a private gated crossing could not alleviate his concerns regarding an unexpected break in the dike along that portion of the river.⁷²
- 39 *Skagit County Fire Protection District No. 3*. Fire District No. 3 offered testimony from its chief, one of its commissioners, and a consultant specializing in fire service response times. Each was opposed to closing the Hickox Road crossing on grounds that doing so would increase emergency response times, potentially endangering lives and property.
- 40 Larry Rabel, a Fire Captain for the City of Kent and an independent consultant on mitigating fire service impacts from growth and development, explained that a station's "response time" is best understood as three distinct components: dispatch, turnout time, and drive time.⁷³ In Mr. Rabel's experience, response time is critically important to providing fire suppression and emergency medical services because fires can double in size every minute, dramatically influencing the responding company's ability to prevent loss of life and property.⁷⁴
- 41 Chief Glenn Harman described the all-volunteer staffing of the district and the response times from its two stations: Cedardale and Conway.⁷⁵ He testified that in

⁷⁰ Boge, Exh. No. 41, 2:22-27, and Boge, TR. 1078:16 - 1079:8 and 1081:11 - 1082:9. *See also* Exh. Nos. 44 and 45 for aerial photographs of this 1951 flood incident.

⁷¹ Boge, Exh. No. 41, 3:30-46 and 4:70-75; *see also* Boge, TR. 1079:17 - 1080:13.

⁷² Boge, TR. 1076:12 - 1077:1.

⁷³ Rabel, Exh. No. 88, 8:8 - 9:18. Dispatch time is usually one minute or less, measured from the time of a 911 call until a dispatcher notifies the appropriate first responders. Turnout time is the period of time it take the station's personnel, who are often off-site, to respond to the station, don the necessary equipment, and be ready to respond to the call. Drive time begins when the fire engine or ambulance departs and ends upon arrival at the site of the emergency.

⁷⁴ *Id.*, 9:20 12:12. *See also* Exh. Nos. 89, 90, and 91.

⁷⁵ Harman Skrinde, Exh. No. 85, 6:1 - 9:18. Chief Harman adopted the prefiled testimony of his predecessor in the position, Chief David Skrinde. *See* Harman, TR. 914:11 - 916:6.

2005, 2006, and the first half of 2007, the fire district had responded to approximately 12 service calls in the area potentially affected by the closure of the Hickox Road crossing; for those calls, their average response time was 13 minutes.⁷⁶ If the first responders had to choose an alternate route due to closing the Hickox Road crossing, Chief Harman contends that the average response time would increase to a minimum of 15 to 17 minutes, exceeding National Fire Protection Association standards.⁷⁷

42 In analyzing the district's response times, Mr. Rabel expressed concern that closure of the Hickox Road crossing would necessarily increase response times to the areas lying west of the crossing.⁷⁸ At hearing, he refused to concede that his analysis of only 8 usable incident reports over a period of several years might not provide an accurate estimation of existing average response times.⁷⁹ However, Mr. Rabel did note that a gated private crossing might mitigate the impact of closure on response times, even though a delay would necessarily be involved in opening a locked gate.⁸⁰

43 Commissioner Benson stated his agreement with Chief Harman's testimony and testified generally about the district's need to relocate its Conway station out of the floodplain, most probably to higher ground east of the BNSF tracks. In his opinion, closing the Hickox Road crossing would negatively amplify the effect on response times caused by the existing need to relocate the Conway station.⁸¹

44 *Western Valley Farms LLC*. Western Valley Farms LLC presented testimony from two of its member farmers, several agricultural businessmen, a physician who lives in the potentially affected area, and the principal of the Mount Vernon Christian School. All were opposed to the proposed closure based on the perceived impacts to agricultural operations, particularly with regard to diverting agricultural equipment traffic to crossings at either Stackpole Road or Blackburn Road.

⁷⁶ Harman ~~Skirde~~, Exh. No. 85, 8:6-14. See also Harman, TR. 919:11 - 927:9.

⁷⁷ *Id.*, 8:11-14 and 9:20 - 12:14 (including Table 1 for driving times and Table 2 for response times). See also Harman, TR. 934:1 - 939:24 (discussion of alternate routes if Hickox Road crossing closed or blocked).

⁷⁸ *Id.*, 13:1 - 16:23.

⁷⁹ See Rabel, Exh. No. 88, 12:13-22, and Rabel, TR. 363:8 - 371:9 and 393:17 - 394:15. See also Exh. Nos. 131, 132, and 133.

⁸⁰ Rabel, TR. 378:4-14 and 381:7-17.

⁸¹ See Benson, Exh. No. 87; see also Benson, TR. 959:14 - 964:8.

45 David Boon and Jeffrey Boon are dairy farmers operating three primary farm sites, two of which are in Skagit County: one on Hickox Road just to the west of the crossing and adjacent to the Burlington Northern rail line, the other a short distance away to the east, across the I-5 interchange.⁸² At the Hickox Road site, the Boon family maintains a herd of 700 dairy cattle, prompting their concerns regarding access to an appropriate flood evacuation route if the crossing were closed.⁸³ Across the freeway, the Boon family harvests crops to feed its herds and must regularly transport those feeds to the Hickox Road farm, typically four round trips per day.⁸⁴ In the fall, the Boons hire a fleet of additional trucks to shuttle the corn harvest to silos at the Hickox Road site, making up to 150 round trips per day.⁸⁵ If the Hickox Road crossing were closed, the trucks would be forced to use the Stackpole Road crossing, adding several minutes to each trip and a distance of about four miles each way, thus increasing costs.⁸⁶

46 John Devlieger farms land along Britt Road and, in operating his agricultural hauling service, relies upon the Hickox Road crossing for convenient access to I-5.⁸⁷ Darrin Morrison farms lands south of Mount Vernon on both sides of I-5 and believes that closing the Hickox Road crossing will force him to incur thousands of dollars in additional transportation costs each year.⁸⁸

⁸² See D. Boon, Exh. No. 67, at 1-2 (question 2) and J. Boon, Exh. No. 71, at 1-2 (question 2). See also Exh. Nos. 68 and 72 (maps). Mr. David Boon was not cross-examined at hearing; his testimony was admitted by stipulation. See TR. 1082:19 - 1083:9, 1117:11 - 1118:7, and 1122:8-15.

⁸³ D. Boon, Exh. No. 67, at 2 (question 3) and J. Boon, Exh. No. 71, at 2 (questions 3 and 4) and pp. 4-5, (questions 10-13). See also J. Boon, TR. 1106:20 - 1109:18.

⁸⁴ D. Boon, Exh. No. 67, at 3 (question 5) and J. Boon, Exh. No. 71, at 2-3 (questions 5 and 6).

⁸⁵ D. Boon, Exh. No. 67, at 4-6 (questions 8 and 9) and J. Boon, Exh. No. 71, at 3-4, (question 9).

⁸⁶ D. Boon, Exh. No. 67, at 4 (question 7) and J. Boon, Exh. No. 71, at 5-6 (question 14). In addition to the longer drive times, operation of the corn chopper during harvest requires a steady stream of empty trucks to be available, potentially requiring the Boons to hire additional trucks and drivers to accommodate the longer route between their two farm sites. See also J. Boon, TR. 1110:2 - 1117:2.

⁸⁷ Devlieger, Exh. No. 83; see also Devlieger, TR. 1118:11 - 1121:22.

⁸⁸ Morrison, Exh. No. 84, Mr. Morrison was not cross-examined at hearing; his testimony was admitted by stipulation. See TR. 1121:23 - 1122:7.

- 47 Richard Smith, a former commissioner for Diking District No. 3, now farms various lands south of Mount Vernon, including one joint endeavor with Mr. Morrison.⁸⁹ Mr. Smith observed that when floods threatened the area in 1990, Hickox Road was a key access route for flood fight operations, particularly for truckloads of crushed rock delivered directly to areas along Dike Road.⁹⁰
- 48 Dr. L. Sloane Winkes and her husband are both physicians who reside on Dike Road and generally rely upon the Hickox Road crossing for access to I-5, particularly when on-call to treat pregnant or critically ill patients at local hospitals.⁹¹ Dr. Winkes testified about her concerns for adding time or mileage to their trips to the hospital if forced to take an alternate route.⁹² She also pointed out the lesser safety features now installed at the Stackpole Road crossing and contended that when in a rush to get to a patient in need, the crossbuck and stop sign may not be sufficient protection from an oncoming train.⁹³ However, Dr. Winkes conceded that her safety concerns would be addressed by upgrading the safety features at Stackpole Road.⁹⁴
- 49 Patrick DeJong, principal of the Mount Vernon Christian School, testified generally about concerns with the potential increase in heavy trucks and agricultural equipment passing by the campus if they are diverted from using the Hickox Road crossing.⁹⁵ At hearing, he explained that a construction project at the school would soon be adding sidewalks and a protected bus driveway for student drop-off and pick-up.⁹⁶ Mr. DeJong acknowledged that these upgrades would improve student safety and, by narrowing the street width on Blackburn Road, perhaps discourage the use of Blackburn Road by larger trucks and farm equipment.⁹⁷

⁸⁹ Smith, Exh. No. 77, at 1-2 (questions 1-3). Mr. Smith was not cross-examined at hearing; his testimony was admitted by stipulation. *See* TR. 1138:15 - 1139:1.

⁹⁰ *Id.*, at 3-4 (question 7).

⁹¹ Winkes, Exh. No. 75, at 1-2 (questions 1 and 2). *See also*, Winkes TR. 866:2 - 869:15.

⁹² *Id.*, pg. 3 (question 5). *See also*, Winkes, TR. 869:16 - 872:9.

⁹³ *Id.*, pg. 2 (question 4). *See also*, Winkes, TR. 872:10 - 873:12 (“... my concern is with the [lack of a] gate and if you’re in a hurry as far as potentially having a different judgment of how quickly a train is coming.”)

⁹⁴ Winkes, TR. 873:6-9.

⁹⁵ DeJong, Exh. No. 79.

⁹⁶ DeJong, TR. 1087:25 - 1090:3.

⁹⁷ DeJong, TR. 1095:16 - 1100:25.

C. Commission Staff.

50 Commission Staff presented testimony and exhibits questioning the need to close the Hickox Road at-grade crossing due to the siding extension forcing drivers to cross a second set of tracks.

51 Paul Curl, a Commission policy specialist and prior Transportation Division Director,⁹⁸ testified generally on Commission policies regarding rail safety. In his opinion, BNSF is responsible to mitigate any dangers caused by constructing a second set of tracks at the Hickox Road crossing.⁹⁹ Mr. Curl testified that any public safety gains from closing the crossing may be “illusory” when compared with the option of leaving the crossing open but upgrading its active safety features through installation of four-quadrant gates.¹⁰⁰

52 Robert Johnston, a Commission transportation specialist, testified generally on his experience with rail safety crossing inspections and in particular about his inspections of the three crossings involved in the case.¹⁰¹ Mr. Johnston noted that public crossings in Washington are inspected at least once every 3 years,¹⁰² and that his most recent inspection of the Stackpole, Hickox, and Blackburn Road crossings found each of them to meet state standards.¹⁰³ Mr. Johnston explained that crossings with multiple tracks are not ideal because “it simply takes more time to cross multiple tracks, exposing the vehicle to the railroad for a great amount of time” and due to the potential for motorists to become confused.¹⁰⁴

⁹⁸ Mr. Curl retired from the Commission in 2002 after 33 years of service. He continues part-time work as a policy specialist focusing on safety and consumer protection issues. *See* Curl, Exh. No. 49, 1:5-14.

⁹⁹ Curl, Exh. No. 49, 2:19-23 and 5:8 - 7:2. *See also* Curl, TR. 875:24 - 877:4 and 885:3 - 887:12.

¹⁰⁰ *Id.*, 3:1-4, 7:5-12, and 8:13 - 9:21. *See also* Curl, TR. 877:8 - 880:13.

¹⁰¹ Johnston, Exh. No. 52. *See also* Exh. Nos. 53-66 (Johnston’s photographs of the crossings).

¹⁰² Johnston, Exh. No. 52, 2:7-18. According to Mr. Johnston, there are approximately 2,700 public crossings in Washington subject to this inspection requirement; however, there are also nearly 3,000 private crossings that receive no inspections from the Commission.

¹⁰³ *Id.*, 7:7 - 9:15. WAC 480-62 sets out the standards for railroad-highway crossings.

¹⁰⁴ *Id.*, 5:6-20.

- 53 Thomas Zeinz, an independent consultant, provided his opinion regarding options to close the Hickox Road crossing or improve its active safety features with installation of four-quadrant gates. He believes that adding a siding will increase the likelihood of a crossing collision for the same reasons cited by the BNSF witnesses: longer wait times will lead some to attempt to “beat the train” and sight impairments along the mainline track may tempt others to go around the lowered gates if they mistakenly believe the safety equipment is malfunctioning.¹⁰⁵
- 54 Mr. Zeinz disagrees with the BNSF and WSDOT witnesses that Hickox Road must be closed, contending that installation of a four-quadrant gate system could mitigate the newly created hazards from the siding track, albeit at considerable expense.¹⁰⁶ Even so, Mr. Zeinz acknowledges that four-quadrant gates are typically found only in high-speed rail corridors to temporarily “seal” crossings as passenger trains rush through, not at multiple track crossings with blocking issues from trains waiting on sidings.¹⁰⁷
- 55 Mr. Zeinz also acknowledged that drivers intent on defeating the added protections of four-quadrant gates could employ some form of roadway chicanery to do so.¹⁰⁸ He acknowledged that a “gate violator” could cause an extremely serious collision with an oncoming train, potentially one with fatal consequences.¹⁰⁹ Finally, Mr. Zeinz noted that

it’s commonly accepted by all the people in my profession from railroads, from state highway departments, from regulatory agencies where I have had experience, if you have a situation where a crossing is going to be routinely blocked by a train, generally the best practice is not to have a crossing there at all, either try and close it or grade separate it or something.¹¹⁰

¹⁰⁵ Zeinz, Exh. No. 50, 2:20 - 3:16 and 5:1 - 6:17

¹⁰⁶ *Id.*, 6:19 - 8:18. “In part, it becomes a value judgment as to whether the potential advantages of retaining the crossing can justify such expense [upwards of \$400,000 to \$500,000], especially the fact that it will still be blocked and rendered unusable from time to time.” Zeinz, Exh. No. 50, 8:14-18.

¹⁰⁷ Zeinz, TR. 1140:14 - 1143:5 (four quadrant gates required when train speeds exceed 110 miles per hour); *see also* Zeinz, TR. 1194:21 - 1197:7 (witness not aware of four quadrant gates used at crossings where trains regularly stop and block crossing for extended periods of time).

¹⁰⁸ Zeinz, TR. 1175:10 - 1181:3.

¹⁰⁹ Zeinz, TR. 1168:7 - 1173:23; *see also* Exh. No. 145.

¹¹⁰ Zeinz, TR. 1195:3-10.

D. Public Comment

56 Nearly two dozen members of the public spoke against closure of the Hickox Road at-grade crossing at two public comment hearings held in January 2008.¹¹¹ Their concerns ranged from impacts on agricultural transportation routes¹¹² to impacts on emergency response services¹¹³ to matters of personal convenience for access to I-5. In addition, the Commission received numerous written comment letters from individuals opposed to the closure as well as several petitions with signatures denoting their disapproval of BNSF's petition to close Hickox Road.¹¹⁴

IV. DISCUSSION AND DECISION

A. New Crossing Petition Not Required for Additional Tracks or Road where Ultimate Intention is to Alter or Entirely Close Existing Grade Crossing

57 The opponents argue for the first time on brief¹¹⁵ that BNSF-WSDOT's plan to extend an existing siding across Hickox Road requires that they first file a petition to open a new grade crossing.¹¹⁶ In short, they contend that BNSF's petition to close the crossing must be denied because it poses the wrong question in the context of applicable law. However, reading the provisions of RCW 81.53 together as a whole,

¹¹¹ Transcripts of both public comment hearings are found at TR. 403:1 – 464:11 (afternoon of January 7, 2008) and 814:1 – 845:1 (evening of January 8, 2008).

¹¹² See, e.g., Alerd Johnson, TR. 409:9 – 411:22, David Christianson, TR. 412:7 – 416:20 and 461:10 – 462:24, and Michael Roozen, TR. 440:10 – 442:5.

¹¹³ See, e.g., John Van Pelt, TR. 417:8 – 419:10, David Olson, TR. 419:22 – 425:20, Skagit County Commissioner Kenneth A. Dahlstedt, TR. 454:1 – 457:17, Joe Woodmansee, TR. 822:14 – 825:25, and Carol Thomas, TR. 836:11 – 840:16.

¹¹⁴ See Ex. Nos. 200, 201, and 202.

¹¹⁵ The parties discussed potential issues for hearing at two different pre-hearing conferences held on June 13, 2007, and August 1, 2007. See Order 01 and Order 02. Further, the parties were afforded the opportunity to file pre-hearing motions in late August 2007 and present oral arguments on those motions in mid-September 2007. See Order 03. At none of these times, nor throughout the hearing process in January 2008, did the opponents make any attempt to question the procedural propriety of the BNSF Petition. Only in their joint Post-Hearing Brief filed in February 2008 did the opponents cavil about this procedural point and decide for the first time to raise this bagatelle of an issue.

it is clear that the Commission has jurisdiction to entertain BNSF's petition as presented.

- 58 Notably, RCW 81.53.030 allows for petitions seeking modification or closure of a crossing even before one exists, as would be the case “where any street or highway is *proposed* to be located or established across any railroad.” Further, if a petitioner seeks alteration, discontinuance, or closing of a crossing, this statute allows for “the opening of an additional crossing for the partial diversion of travel” without specifying any need for a separate or earlier hearing under RCW 81.53.030.
- 59 The opponents take the position that the Commission must consider approval of a new crossing and its closure in sequential proceedings: one on the practicability of the new crossing being other than at-grade, and then a subsequent hearing on public safety impacts. The opponents point to nothing in RCW 81.53 that prohibits BNSF from filing a single petition for altering or closing an existing crossing when public safety so requires, even if the reason is the proposed addition of a second set of tracks. Instead, the opponents rely on *State ex. Rel. City of Toppenish v. Public Service Commission*¹¹⁷ for the proposition that a new crossing must always and only be considered under the terms of the practicability test of RCW 81.53.030, without simultaneous regard for the public safety considerations of RCW 81.53.060.¹¹⁸ This is simply incorrect.
- 60 The *Toppenish* court ruled on whether the Commission then had the power to deny a municipality's desire to establish a grade crossing when the facts demonstrated the impracticability of placing the crossing above or below track level.¹¹⁹ The *Toppenish* court made no ruling, as the opponents contend, that a railway's plans to place additional siding tracks across an existing crossing preclude a petition to close the

¹¹⁶ Opponents' Joint Post-Hearing Brief, ¶¶ 3-4 and 6-26. These arguments ignore the issues presented by the petition and veer into the more abstract realm of chickens, eggs, carts, and horses, attempting to derail this case at the very last opportunity.

¹¹⁷ 114 Wn. 301, 308-09, 194 P. 982, 984 (1921).

¹¹⁸ Opponents' Joint Post-Hearing Brief, ¶¶ 18-21.

¹¹⁹ The current version of RCW 81.53.030 allows the Commission to either grant *or* deny petitions seeking to establish new grade crossings, altering the “force of the plan mandatory language” and solidifying the present authority of the Commission to absolutely resolve any question of whether or not a crossing shall be permitted at any particular location.

crossing unless and until a previous petition to allow the new tracks has been considered and granted.¹²⁰ The opponents' arguments offer at the least a mandate for inefficiency and waste and at worst a regulatory Catch-22.

- 61 The opponents' argument would require railway companies seeking to close an existing at-grade crossing due to plans to add one or more sets of tracks to first file a petition for these "new" crossings and then, presumably after achieving success in this endeavor, immediately return to the Commission with a petition to close the newly expanded crossing. This approach not only would require two hearings, each at cross-purposes to the other despite focusing on essentially the same issues, but also demands that the Commission approve creation of a potentially more dangerous crossing before considering whether the existing crossing can be altered or closed.
- 62 The interests of judicial efficiency are best served by a single hearing on the modification or closure of any existing crossing. BNSF's petition seeks closure of an existing at-grade crossing on assertions that (a) it is redundant, (b) doing so will improve safety, and (c) closure will accommodate the proposed expansion of a siding that implements a legislatively approved project under Washington's Passenger Rail Program.¹²¹ Under RCW 81.53.060, the Commission may consider various options in evaluating and acting on the petition, including outright denial or the imposition of further modifications to the crossing to ensure public safety upon the expansion of the crossing to include the siding tracks. RCW 81.53 does not require BNSF to submit several petitions to afford the Commission this same discretion.

¹²⁰ See Opponents' Joint Post-Hearing Brief, ¶ 18, which misaligns partial quotations from *Toppenish*. Regrettably, the opponents create a similar misrepresentation when invoking Commission Staff in support of their position. See *Id.*, ¶¶ 24-25, which fails to quote the immediately preceding paragraph of Staff witness Curl's testimony where the witness explicitly qualifies his position by stating:

I want to be clear that I am not arguing that the Commission has authority to prevent BNSF and WSDOT from building a siding over Hickox Road. I am arguing, however, that the Commission has authority to determine the conditions that exist at a highway/railroad crossing and to apportion the cost of necessary safety measures at the crossing to the party they benefit (or, put another way, to the party that caused the danger that is being mitigated).

Curl, Exh. No. 49, 5:8 - 7:2. Mr. Curl's testimony, when read in its full context, does not support the arguments advanced in the opponents' brief.

¹²¹ See Petition, at 2-3.

B. Closure

- 63 As noted above, RCW 81.53.060 allows for railroad companies to file written petitions with the Commission seeking the “closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing” when the petitioner alleges “that the public safety requires” such action. BNSF filed its petition in this matter in accordance with this statute and therefore carries the burden of proving, by a preponderance of the evidence, that public safety requires closure of the Hickox Road grade crossing.¹²²
- 64 The legislature has decreed that, whenever practical, railway-highway crossings must be accomplished by means of grade separations, such as overpasses or underpasses.¹²³ The underlying principle for this law is the accepted theory that all grade crossings are inherently dangerous.¹²⁴ Further, the legislature has long recognized the need for clear fields of vision around grade crossings and prohibited structures or the spotting of trains, railcars, or railway equipment within one hundred feet of a grade crossing.¹²⁵
- 65 In evaluating petitions for closure of a grade crossing found to be dangerous and unsafe, the Commission is authorized to “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.”¹²⁶ Further, the Commission has previously explained that the absence of evidence of accidents at a given crossing neither demonstrates that it is more safe or less dangerous than other similar crossings nor provides any predictive value as to future accidents.¹²⁷

¹²² Order 01, ¶ 5.

¹²³ RCW 81.53.020.

¹²⁴ *See Reines v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 195 Wn. 146, 150, 80 P.2d 406, 407 (1938); *State ex rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla County*, 5 Wn.2d 95, 104, 104 P.2d 764 (1940); *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 250-51 and 257, 212 P.2d 829, 831-32 and 835 (1949).

¹²⁵ *See* RCW 81.53.080.

¹²⁶ *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 254 (1949). *See also* Order 02, ¶ 6 and Order 03, ¶ 8.

¹²⁷ *Burlington Northern and Santa Fe Railway Company v. City of Sprague*, Docket TR-010684, Fourth Supplemental Order (January 10, 2003), ¶¶ 40-41.

- 66 Here, the Hickox Road crossing is as inherently dangerous as any other grade crossing. Adding the siding tracks will magnify the potential dangers by obstructing motorists' vision as they approach the crossing and also cause confusion on the regular occasions where a train blocks the crossing for appreciable lengths of time.
- 67 The addition of another set of tracks will pose the additional problem that a train waiting on the siding track nearest a driver may obstruct the view of oncoming train traffic on the main line.¹²⁸ Several BNSF and WSDOT witnesses expressed concerns that persons waiting at a gated crossing might only observe the train stopped on the siding and become impatient with their apparently unnecessary delay. If they then decided to drive around the gates, they could be struck by an oncoming high-speed passenger train or another freight train. Although this reduced visibility situation might not be presented to motorists stopped on the main line side of the crossing, the potential for impatient drivers skirting safety features will be increased at a Hickox Road crossing that includes multiple tracks.
- 68 Further, the BNSF and WSDOT witnesses explained that rail operations could regularly require freight trains to block the Hickox Road crossing, occasionally for lengthy periods of time. This situation creates uncertainty whenever a train rolls into the crossing and stops, as there is no method for notifying the motoring public of how long the train will block the crossing. Even if BNSF obtained an exemption from the Commission's "ten minute rule" regarding blockage of public grade crossings, the potential for public confusion and frustration would remain.¹²⁹
- 69 The evidence presented in this matter demonstrates that Hickox Road will become a more dangerous crossing after completion of the siding project. In the past, based on concerns regarding reduced visibility and multiple tracks, the Commission has

¹²⁸ See *BNSF v. City of Sprague*, Docket TR-010684, Fourth Supplemental Order, ¶ 53, citing to *BNSF v. Skagit County*, Docket TR-940282 (December 13, 1996); *BNSF v. City of Ferndale*, Docket TR-940330 (March 31, 1995); and *Spokane County v. Burlington Northern, Inc.*, Cause TR-1148 (September 1985).

¹²⁹ WAC 480-62-140 provides a method for BNSF to seek an exemption to the WAC 480-62-220 rule prohibiting blockage of a grade crossing for more than 10 minutes, if reasonably possible. Although the language of WAC 480-62-220 arguably allows for crossings to be blocked for longer periods when "splitting" the train is not reasonably possible, the railroad could be assured that it would not be penalized for violating a Commission rule by obtaining such an exemption. See also Post-Hearing Brief on Behalf of Commission Staff, ¶¶ 15-18.

characterized such crossings as “especially hazardous”¹³⁰ or “particularly dangerous.”¹³¹ There is no evidence in the record to support any other conclusion in this matter: after completion of the siding project, Hickox Road will become a much more dangerous at-grade crossing.

70 Hickox Road is already an at-grade crossing and no party suggested it practicable to retain the crossing by its conversion to a below- or above-grade crossing. Aside from upgrading the existing active safety features from two quadrant gates to four quadrant gates, no party offered options for relevant mitigation measures at a still-open Hickox Road crossing. Even so, Commission Staff witness and consultant Thomas Zeinz conceded that the dangerous situation presented by this case could not be fully mitigated by keeping the crossing open through use of four quadrant gates.¹³²

71 Here, after completion of the siding project, Hickox Road will become so unsafe and dangerous that it must be closed to further public travel. Therefore, by law, it can only remain open if “the need for the crossing is so great that it must be kept open notwithstanding its dangerous condition.”¹³³ In making this determination, the Commission evaluates a) the amount and character of travel on the railroad and on the highway, b) the number of people affected by the closure, c) whether there are readily available alternate crossings in close proximity that can handle any additional traffic resulting from the closure, and d) whether the alternative crossings are safer than the crossing proposed for closure.¹³⁴

72 There was extensive testimony from witnesses and members of the public about the perceived need for the Hickox Road crossing and the inconveniences that would be imposed by its closure. However, WSDOT presented a traffic study showing that less than 400 cars crossed the tracks at Hickox Road each day. The opponents criticized the accuracy of this traffic study but offered no competing traffic study of their own.

¹³⁰ See *BNSF v. City of Sprague*, Docket TR-010684, ¶ 53.

¹³¹ See *BNSF v. Skagit County*, Docket TR-940282, pg. 4.

¹³² See contrary position in Post-Hearing Brief on Behalf of Commission Staff, ¶¶ 28 and 32-35.

¹³³ See *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 254, 212 P.2d 829 (1949).

¹³⁴ See *BNSF v. City of Ferndale*, TR-940330 (March 31, 1995); *BNSF v. Skagit County*, TR-940282 (December 13, 1996); and *Union Pacific Railroad v. Spokane County*, TR-950177 (July 3, 1996).

To the contrary, WSDOT witness Gary Norris confirmed that his traffic study's numbers matched the counts found in the City of Mount Vernon's traffic assignment map model relied upon in developing its comprehensive plan.¹³⁵ The evidence in this case demonstrates that traffic on Hickox Road is relatively light and that rail traffic, now consisting of at least 16 trains per day, will be increasing in the future.

73 The number of people affected by the closure of the Hickox Road crossing is not insignificant, but the rural area most directly affected by BNSF's proposed closure is relatively sparsely populated when compared to its neighbors to the north. Even so, under normal conditions, the Stackpole Road and Blackburn Road crossings are readily available and in reasonably close proximity. WSDOT's traffic analysis demonstrates that these alternate crossings can absorb additional traffic diverted from Hickox Road for all normal transportation needs. The situation presented by emergency response needs, however, particularly with regard to flood conditions, is a separate matter requiring mitigation better suited to the unscheduled and irregular nature of emergency situations and flood-related incidents.

74 Finally, after the safety upgrades pledged by BNSF for the Stackpole Road crossing are in place, Stackpole Road will be as safe as the Hickox Road grade crossing in its present configuration. Blackburn Road, despite its complex intersection of multiple roadways over two tracks, will certainly remain safer than the situation presented by the added siding at Hickox Road.

75 The fullest possible analysis regarding the Hickox Road at-grade crossing demonstrates that public safety requires its closure and that public need and convenience are not so great as to require its retention despite its dangerous condition. Even so, as further explained below, the crossing should not be completely eliminated, but converted from a public crossing into a private crossing.

76 BNSF may close the Hickox Road crossing to the public, but only after upgrading the safety features at Stackpole Road to include flashing light signals, automatic gates,

¹³⁵ See G. Norris, TR. 797:20 – 802:8 and 804:25 – 805:17.

and warning bells. In accordance with its petition, BNSF shall bear the entire cost of installing and maintaining these new safety devices at Stackpole Road.¹³⁶

77 Conversion of Hickox Road into a private crossing will also require some mitigation measures to alleviate traffic concerns and enable motorists encountering a closed road to seek an appropriate alternate route. BNSF has suggested it is amenable to working with the City of Mount Vernon and Skagit County to construct a turnaround cul-de-sac west of the railroad tracks on Hickox Road.¹³⁷ BNSF shall be required to complete this work on either the west or east side of the tracks¹³⁸ and, in addition, to make the intersection radii improvements recommended in the WSDOT traffic study.¹³⁹ Costs for these road improvements shall be apportioned between BNSF and the responsible local governmental authorities as appropriate under RCW 81.53.

C. Private Crossings

78 According to the FRA, private crossings typically exist on roadways not open to use by the public nor maintained by any public authority and are governed by an agreement between a land owner and the railroad. Normal uses include farm crossings that provide access between tracts of land lying on both sides of the railroad. Some private crossings have sufficient train and roadway traffic volume that they require active traffic control devices.¹⁴⁰

79 In this case, BNSF recognizes that it may be necessary to convert the existing public crossing at Hickox Road into a private crossing for emergency access use by local governmental authorities.¹⁴¹ However, the evidence in this case further suggests that

¹³⁶ RCW 81.53.261 and .271 may normally allow a different apportionment of costs, but BNSF's Petition affirmatively recognizes the need for such upgrades at Stackpole Road and, as mitigation for the requested closure of Hickox Road, appropriately takes responsibility for their installation and maintenance.

¹³⁷ BNSF Post-Hearing Brief, ¶ 96.

¹³⁸ The cul-de-sac turnaround may prove more useful on the east side of the tracks, between the tracks and Old Highway 99, but the ultimate decision on appropriate placement of the turnaround cul-de-sac is best left to the City of Mount Vernon and Skagit County.

¹³⁹ See Exh. No. 13; see also G. Norris, Exh. No. 11, 23:31 – 24:9 and G. Norris (rebuttal), Exh. No. 15, 6:16-20.

¹⁴⁰ Exh. No. 101, pp. 191-193.

¹⁴¹ BNSF Post-Hearing Brief, ¶¶ 94-95.

a second private crossing agreement with local farming interests is also merited in order to accommodate transportation requirements associated with the late summer and early fall harvest seasons.

1. Private Crossing for Emergency Response by Local Government

80 The evidence presented in this case makes clear the special considerations necessary when closing a road that provides access in and out of a floodplain regularly threatened with submergence below the waters of the Skagit River. Further, the evidence presented in this case demonstrates that response times for non-flood-related emergencies will be detrimentally affected by eliminating the Hickox Road crossing. Therefore, as conceptually agreed by many witnesses at hearing, BNSF shall be required to convert the public crossing into a gated private crossing for use in emergency situations. This private crossing shall be open to use by appropriate emergency response organizations within the City of Mount Vernon's government, the Skagit County government, and by any unit of Skagit County Fire Protection District No. 3.

81 In order to ensure the safety of crews fighting the rising river and any members of the public making use of the crossing to evacuate the area west of the railroad tracks, the safety measures now in place at the Hickox Road crossing must remain in place. Although BNSF may typically prefer to remove warning bells and gates from an active grade crossing converted to a private crossing,¹⁴² the potential for extended periods of flood-related emergency use at this private crossing mandates otherwise. When the locked gate at Hickox Road is opened for flood-fight activities, the multi-day nature of these operations suggests a high potential for collision between a train and motor vehicle traffic rushing to evacuate or attend to flood-fight responsibilities. Use of flag men by either the local government(s) or the railway during such a crisis period would not be an efficient use of manpower.

¹⁴² See MacDonald, TR. 348:23 - 350:13 and 354:10-23 (discussing use of locked gate in conversion from active to private crossing and usual removal of active warning devices).

82 Further, Fire District No. 3 will need to re-evaluate its response plans and mutual aid agreements in light of the conversion of the Hickox Road at-grade crossing from a public access road to a gated private crossing. In non-flood-related emergencies, such as house fires or medical emergencies, access across a gated private crossing may not always be the fastest or most efficient route to the call, particularly for first responders. However, the evidence clearly shows that minutes and seconds are vital to community members summoning help by calling 911. This sort of case-by-case determination is beyond the expertise of the Commission and, given the relatively low number of responses Fire District No. 3 made to the affected area over a period of approximately 30 months (2005 through mid-2007), it is acknowledged such a need may never arise. Nevertheless, a reasonable sense of caution and prevention requires expanding the scope of this private crossing agreement beyond flood-related emergencies so as to provide Fire District No. 3 with maximum flexibility in its response options so as to best protect those citizens working and residing on the west side of the Hickox Road crossing.

83 BNSF shall promptly enter into negotiations with the City of Mount Vernon, Skagit County, and Fire Protection District No. 3 to draft an appropriate private crossing agreement that allows access across the tracks for all of these local emergency responders. Further, the agreement shall address governmental responsibilities to open the crossing to provide flood evacuation access to members of the public in appropriate and declared emergency circumstances.

84 Access shall not be limited to flood-related events, but shall be permitted for any and all threats to the health, safety, and welfare of local residents. The private crossing agreement shall also address the need for inter-governmental cooperation in considering when the locked gate is opened and ensuring that the gate is again closed following any emergency situation or response.

2. Private Crossing for Seasonal Harvest Use by Western Valley Farms

85 The evidence presented in this case also makes clear that special considerations are necessary when closing a road that provides the most direct access to a long-established business that could be “financially landlocked” if existing access is

eliminated.¹⁴³ As noted above, the FRA specifically includes farm crossings within its listing of appropriate uses for private crossings.

86 Western Valley Farms' need for the Hickox Road crossing is greater than and distinct from all other local agricultural businesses operating in the area west of the crossing. During most times of the year, the movement of farm equipment to fields bisected by I-5 is an annoyance that must be accomplished across whatever route is shortest and safest. Closure of the Hickox Road grade crossing will not alter this situation for Western Valley Farms, Mr. Smith, Mr. Devlieger, or any other agricultural concern.

87 However, the uncontested evidence presented in this case shows that Western Valley Farms has become totally financially dependent on the existence of the Hickox Road crossing during the late summer harvest season. It is not merely a matter of inconvenience to require Western Valley Farms to hire several additional trucks and drivers to transport its corn harvest across I-5, but a question of threatening the financial health of a long-established family farm business.¹⁴⁴ Therefore, BNSF shall be required to convert the public crossing into a gated private crossing for seasonal use by Western Valley Farms.

88 Despite the existence of a private crossing, it will remain possible for BNSF freight trains to block the Hickox Road crossing and potentially interfere with Western Valley Farms' harvest operations, requiring trucks to detour around the blocked crossing and utilize Stackpole Road to access the farm's storage silos.¹⁴⁵ However, BNSF and Amtrak cannot reasonably be expected to cease their operations to accommodate the Western Valley Farms harvest season. Instead, the parties should provide each other with sufficient advance notice of their schedules to minimize disruptions to Western Valley Farms and allow BNSF (and Amtrak) to advise its engineers of farm equipment temporarily making use of the crossing at Hickox Road.

¹⁴³ We note that a private crossing already exists north of Hickox Road for the benefit of David Christianson's business, which would otherwise be geographically landlocked. This order does not address the modifications, if any, that might become necessary to the existing private crossing agreement between BNSF and Mr. Christianson once the siding project is complete.

¹⁴⁴ See D. Boon, Exh. No. 67, and J. Boon, Exh. No. 71.

¹⁴⁵ See J. Boon, TR. 1113:17 – 1115:25; see also WSDOT's Closing Brief, at 7.

89 BNSF shall promptly enter into negotiations with Western Valley Farms to draft an appropriate private crossing agreement that allows seasonal access across the tracks at Hickox Road for Western Valley Farms' harvest operations. This private crossing agreement shall include a requirement for Western Valley Farms to provide advance notice to BNSF of its harvest schedule and for BNSF to then provide Western Valley Farms applicable schedules for planned rail traffic, including any projected blockings of the Hickox Road crossing due to meet and pass or other operational requirements.

C. Improvements at Nearby Grade Crossings

90 Closure of the Hickox Road crossing to public use will require daily traffic to divert to alternate crossings: Stackpole Road or Blackburn Road. Accordingly, these crossings may require safety upgrades to handle the additional traffic.

1. Stackpole Road

91 BNSF has on numerous occasions expressly acknowledged its intent and commitment to bring the Stackpole Road crossing up to the same level of safety as that now in place at Hickox Road.¹⁴⁶ Further, the WSDOT traffic study indicates that the great majority of traffic currently using Hickox Road to cross the BNSF tracks will decide it most convenient to divert to Stackpole Road.¹⁴⁷

92 Therefore, as noted above, BNSF shall, at its own cost, install and maintain upgraded safety features at Stackpole Road to include flashing light signals, automatic gates, and warning bells. Upon completion of these improvements, Stackpole Road will enjoy functionally equivalent safety features to those currently in use at Hickox Road.

2. Blackburn Road

93 The WSDOT traffic study demonstrates that Blackburn Road already handles much more traffic than Hickox Road and has additional capacity to absorb all of the traffic diverted as a result of closing Hickox Road.¹⁴⁸ The record contains no evidence to

¹⁴⁶ See Petition, ¶ 3-1, and BNSF Post-Hearing Brief, ¶ 97. See also TR. 879:4 to 880:13.

¹⁴⁷ Exh. No. 13.

¹⁴⁸ Ex. No. 13; see also G. Norris, TR. 751:23 - 752:7; see also G. Norris, TR. 785:17 - 786:4

suggest that additional traffic at Blackburn Road, despite its less than ideal road-track intersection configuration, will alter the level of safety currently in place. Further, given the extensive passive and active safety measures already confronting drivers, there is little to be gained from erecting additional signs or barriers.

94 The situation at Blackburn Road crossing is not being changed. Trains will continue to pass through the crossing at the same speed and at similar frequencies to those currently established. The diversion of up to several hundred additional motor vehicle trips per day, even if some might be large trucks or unwieldy agricultural equipment, does not obviate the need to re-engineer the Blackburn Road crossing. Therefore, no upgrades to Blackburn Road shall be required as a result of the BNSF Petition to close the Hickox Road crossing.¹⁴⁹

FINDINGS OF FACT

95 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

96 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the placement and conditions of operation of crossings at grade of railroad tracks with public roadways within the State of Washington.

97 (2) The Burlington Northern and Santa Fe Railway Company (BNSF) petitioned on April 11, 2007, for authority to close the highway-railway crossing at Hickox Road in the City of Mount Vernon, Skagit County, Washington.

¹⁴⁹ The Commission shall retain its independent ability to inspect the Blackburn Road crossing and, as necessary in the future, require appropriate modifications.

- 98 (3) The Hickox Road at-grade crossing is located at the southern edge of the city limits of Mount Vernon. On an average day, 4 Amtrak passenger trains, a dozen freight trains, and less than 400 vehicles make use of the crossing.
- 99 (4) The Hickox Road crossing is within one mile of a crossing to the south (Stackpole Road) and one and one-half miles of a crossing to the north (Blackburn Road). One or both of those crossings provide the general public with suitable alternative access across the tracks with a minimum of inconvenience during normal conditions.
- 100 (5) Closure of the Hickox Road crossing will divert a majority of its current traffic to Stackpole Road, with the remainder diverted to Blackburn Road.
- 101 (6) At-grade crossings with more than one set of tracks are more dangerous than at-grade crossings with only a single set of tracks. When a siding track creates the potential to obstruct a motorist's view of the main line track, the siding becomes exceptionally hazardous.
- 102 (7) The Skagit River poses regular threats of flooding to the areas surrounding the Hickox Road crossing, requiring continued access by local governmental agencies in order to maintain their abilities to fight the rising river and permit the public to utilize an alternate emergency evacuation route when necessary.
- 103 (8) Closure of the Hickox Road crossing will detrimentally impact emergency response times by Skagit County Fire District No. 3 to areas located west of the Hickox Road crossing.
- 104 (9) The Hickox Road crossing is critically located and its continued use is crucial for established harvest activities of Western Valley Farms, LLC.

CONCLUSIONS OF LAW

105 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

- 106 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding.
- 107 (2) The Hickox Road crossing in Mount Vernon, Skagit County, Washington, is dangerous. WSDOT's addition of a second set of tracks to this crossing magnifies the danger presented to vehicle traffic, creating an exceptionally hazardous crossing upon completion of WSDOT's siding extension project.
- 108 (3) Under normal conditions, traffic can conveniently use the Stackpole Road crossing to the south or the Blackburn Road crossing to the north.
- 109 (4) Closure of the Hickox Road crossing will result in inconvenience to some persons who now use the crossing. Mitigating measures, such as upgrading the safety features at the Stackpole Road at-grade crossing, creation of a turnaround cul-de-sac on the approach to the railroad tracks on Hickox Road, and certain improvements to intersection radii at Stackpole Road and Dike Road, can ameliorate concerns about closure of the Hickox Road crossing.
- 110 (5) The public convenience and necessity do not require that the Hickox Road crossing remain open. The Commission should grant BNSF's petition and should order that the Hickox Road crossing in Mount Vernon be closed to the public, upon conditions that will mitigate the inconvenience of closure.
- 111 (6) The risk of flooding from the Skagit River presents the community with health, safety and welfare challenges that cannot be satisfactorily addressed without creation of a private crossing at Hickox Road benefiting local governmental agencies.
- 112 (7) Ensuring that Skagit County Fire District No. 3 retains maximum flexibility in choosing the best route to respond to an emergency, even if that includes passing through a locked gated private crossing, is necessary to protect the health, safety and welfare of citizens working or residing west of the Hickox Road at-grade crossing.

- 113 (8) The financial impact on Western Valley Farms from closing the Hickox Road crossing cannot be adequately mitigated without creation of a private crossing to permit continued seasonal use of the crossing for harvest activities.

ORDER

THE COMMISSION ORDERS:

- 114 (1) The Commission grants, subject to conditions, Burlington Northern's petition to close the Hickox Road at-grade crossing to public use.

- 115 (2) Authority to close the Hickox Road crossing is granted upon the following conditions, which must be met prior to closure:

- (a) First, BNSF shall upgrade the safety features at the Stackpole Road at-grade crossing to include active warning devices equivalent to those now in place at Hickox Road (flashing light signals, automatic gates, and warning bells).
- (b) Second, BNSF shall work with the City of Mount Vernon and Skagit County to construct a turnaround cul-de-sac on the approach to the railroad tracks on Hickox Road and to alter intersection turning radii at Stackpole Road and Dike Road.
- (c) Third, BNSF shall enter into negotiations with the City of Mount Vernon, Skagit County, and Skagit County Fire Protection District No. 3 to draft a private crossing agreement that ensures continued access across the tracks for local emergency response to flood-related events as well as incidents where the health, safety, and welfare of local residents would be improved. BNSF shall submit this agreement to the Commission no later than seventy-five days after entry of a Final Order in this matter.

(d) Fourth, BNSF shall enter into negotiations with Western Valley Farms to draft a private crossing agreement that allows seasonal access across the tracks for the purpose of transporting its corn harvest from east of I-5 to the farm location at Hickox Road. BNSF shall submit this agreement to the Commission no later than sixty days after entry of a Final Order in this matter.

(e) Finally, in support of these private crossing agreements and to ensure adequate safety at the private crossing, BNSF shall continue to operate and maintain the existing safety features at the Hickox Road crossing.

116 (3) The Commission retains jurisdiction over the subject matter and the parties to the proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective June 25, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order, any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such an answer.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and twelve (12) copies of any Petition or Answer must be filed by mail delivery to:

Attn: David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250