

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY, a)
Delaware Corporation,)
)
Petitioner)
)
vs.)
)
CITY OF MOUNT VERNON)
)
Respondent)
_____)

DOCKET NO: TR-070696

**BNSF RAILWAY COMPANY'S REPLY
TO SKAGIT COUNTY FIRE PROTECTION DISTRICT NO. 3,
CITY OF MOUNT VERNON and SKAGIT COUNTY'S JOINT ANSWER
TO BNSF'S PETITION FOR ADMINISTRATIVE REVIEW**

July 29, 2008

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ANALYSIS

1 BNSF submits the following Reply to *Skagit County Fire Protection District No. 3, City of Mount Vernon and Skagit County's Joint Answer to BNSF's Petition for Administrative Review*.

I. Private Crossing Agreement for Access Will Address Emergency Response and Flood Related Activities.

2 The fire district, city and county express concern over BNSF's proposed language for paragraph 115(2)(c) of the initial order, however, the parties' apprehension apparently stems in part from a misconception that BNSF seeks to exclude non-flood-related emergency access.¹ The *Joint Answer* inadvertently misquotes BNSF's proposed language revision.² To remedy any confusion BNSF offers to amend its proposed language to address the *Joint Answer's* unforeseen concern and ensure "continued access across the tracks for local emergency response and flood-related events. . . ."³ Put simply, BNSF does not seek to limit the city, county or fire district's emergency-response access solely to flood-response operations.

II. "Health Safety and Welfare" Language Is Overbroad When Inserted and Read Independently.

3 As currently written, the last clause of Paragraph 115(2)(c) in the initial order is overbroad and vague:

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 and flood-related events *as well as incidents where the health, safety, and welfare of local residents would be improved*.⁴

¹ *Joint Answer* ¶¶ 2-8.

² See *Joint Answer* ¶ 5 (improperly quotes BNSF's proposed change as ". . . emergency response *to* flood-related events;" the actual proposed language reads ". . . emergency response *and* flood-related events."). See *BNSF's Petition for Review*; see also Exhibit A to *Joint Answer*.

³ See amended proposed language in Table below.

⁴ See Initial Order ¶ 115(2)(c) (emphasis added).

“Incidents where the health, safety, and welfare of local residents would be improved” could be interpreted to mean just about anything. Arguably, it could be interpreted to include seasonal farm use. Throughout the proceedings, the opposing parties have also contended that it would improve the health, safety and welfare of the local residents to keep agricultural traffic away from the Blackburn crossing and Dike Road, i.e., leave the Hickox crossing open to public travel.⁵ Without modification, paragraph 115(2)(c) would potentially allow the municipalities to define “health,” “safety,” “welfare,” and “improved” expansively in order to leave the crossing open for unrestricted public use.

4 BNSF proposes the following (amended) change. This language is meant to both rectify the initial order’s ambiguity and address the concerns set forth in the municipalities’ *Joint Answer*.

<i>Initial Order</i>	<i>Original Language</i>	<i>(Amended) Proposed Language</i>
¶ 115(2)(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.	Third, BNSF, the City of Mount Vernon, Skagit County and Skagit County Fire District 3 shall negotiate in good faith and enter into a private crossing agreement that ensures continued <i>access across the tracks for local emergency response and flood-related events in order to protect the health, safety, and welfare of local residents</i> . The private crossing agreement shall reflect a diagnostic team’s determination as to the applicable warning devices, if any, to be implemented when the crossing is converted to an emergency-access private crossing. The private crossing agreement shall determine which party will undertake the work and cost of removal. ⁶ BNSF shall submit this agreement to the Commission no later than seventy-five days after entry of a Final Order in this matter.

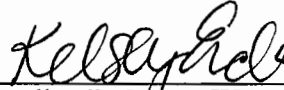
⁵ See, e.g., *WVF’s Petition for Review*.

⁶ This provision is technically correct. Although the municipalities take issue with its language (see *Joint Answer* ¶¶ 9-10), Mr. MacDonald of BNSF testified “that the person that initiated the project that created the issue . . . would be responsible” for the mitigation “so that it does not impose on the other party a burden they didn’t ask for.” MacDonald, TR:330:16-22. Thus, it is expected that BNSF will undertake the work and cost of removal, and the private crossing agreement will reflect BNSF’s obligation.

For the reasons set forth herein, BNSF respectfully requests the Commission adopt its (amended) proposed language change to paragraph 115(2)(c) in its Final Order.

DATED this 29th day of July, 2008.

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CERTIFICATE OF SERVICE

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

I hereby certify that the original and 12 copies of *BNSF's Reply to Municipalities' Answer to BNSF's Petition for Administrative Review* has been sent by FedEx to The Executive Secretary at WUTC and a PDF and Word Perfect version sent by electronic mail. I also certify that true and complete copies have been sent via electronic mail and U.S. Mail to the following interested parties:

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

DATED this 29th day of July, 2008 at Seattle, Washington.



Lisa Miller, Paralegal