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May 24, 1995

Steve McLellan, Secretary  
Washington Utilities and  
Transportation Commission  
1300 S. Evergreen Park Drive SW  
P. O. Box 47250  
Olympia, WA 98504-7250

RE: Docket Nos. TR-940309

Dear Mr. McLellan:

Enclosed are the original and three copies of the Petitioner's Answer to Petition for Administrative Review in the above-referenced matter. Please accept the same for filing.

Very truly yours,

JEANNE A. CUSHMAN  
Assistant Attorney General  
Attorney for Washington State  
Department of Transportation

JAC:ph  
Enc.

cc: Ann Rendahl  
Alden Clark  
Rexanne Gibson  
Tom Graafstra and Bruce Keithly

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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition )  
of the WASHINGTON STATE )  
DEPARTMENT OF TRANSPORTATION, )  
BURLINGTON NORTHERN RAILROAD )  
COMPANY, and THE NATIONAL )  
RAILROAD PASSENGER CORPORATION) )  
for Modification of Order )  
Regulating the Speed of )  
Passenger Trains in Marysville) )  
Washington. )

DOCKET NO. TR-940309

ANSWER TO PETITION FOR  
ADMINISTRATIVE REVIEW

COME NOW the Petitioners, Washington State Department of Transportation, Burlington Northern Railroad and the National Rail Passenger Corporation (Amtrak) and answer the Petition of the City of Marysville for Administrative Review of the Initial Order Granting Petition.

**I. STANDARD OF REVIEW**

As a statutorily created agency of the State of Washington, the adjudicative proceedings of the WUTC are governed by the Administrative Procedures Act, Chapter 34.05 RCW. The standard for judicial review of adjudicative proceedings conducted by the WUTC is contained in RCW 34.05.570 which provides that adjudicative orders must be supported by evidence that is

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1 substantial when viewed in light of the whole record before the  
2 court. Lawter v. Employment Security Department, 73 Wn.App 327,  
3 869 P.2d 102 (1994) citing Tapper v. Employment Security  
4 Department, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). This is  
5 known as the "substantial evidence" standard.

6 In their Petition for Administrative Review, the City of  
7 Marysville is requesting the Commission to make findings of fact  
8 and corresponding conclusions of law based on specific, selected  
9 evidence which is not supported by the record as a whole. The  
10 City's argument is inconsistent with the substantial evidence rule  
11 as stated RCW 34.05 570 and the cases interpreting the statute.

12 In addition to the specific answers contained herein,  
13 Petitioners refer the Commission to the Closing Briefs of the  
14 Petitioners and the Commission Staff which contain argument and  
15 citation to the record as a whole in support of the increased  
16 speeds in conformance with correct application of the substantial  
17 evidence test.

## 18 II. ANSWER TO PETITION

### 19 A. City's Challenge to Summary Portion of Initial Order.

20 The City of Marysville takes issue with portions of the of  
21 the Initial Order. Petitioners answer the objections in the order  
22 presented by the City.

23 1. Deny. Grade crossing protection is intertwined with the  
24 traffic signals at four intersections in Marysville. The other  
25 six intersections near grade crossings in Marysville are not

1 | signalized and therefore cannot be intertied to the crossing  
2 | protection equipment. TR 160-161. Traffic interties serve two  
3 | purposes: 1) to prevent cars from going through the intersection  
4 | and into the crossing area when a train is approaching, and 2) to  
5 | allow cars in the crossing area to clear out through the  
6 | intersection when a train approaches. TR 161. The statement in  
7 | the initial order accurately describes the purpose of the traffic  
8 | intertie.

9 |         The City argues that the statement is defective because  
10 | gridlock occurs at times in the City which blocks the  
11 | intersections and makes the interties ineffective.

12 |         The City's argument disregards the responsibility the  
13 | motorist must bear to obey traffic laws which prohibit blocking  
14 | intersections. Plus the fact that the proposed posting of "DO NOT  
15 | STOP ON TRACKS" signs would serve as a further reminder to  
16 | motorists not to move their cars onto tracks at any time unless  
17 | there is adequate room to clear the crossing. When testifying on  
18 | behalf of the Commission Staff, Gary Harder put problem of  
19 | motorists driving their cars onto tracks without adequate  
20 | clearance succinctly when he stated that, "There is no engineer  
21 | that can design for that type of person driving an automobile."  
22 | TR 437.

23 |         The City goes on to argue that the heavy local traffic (which  
24 | sometimes causes gridlock, and is projected to increase in the  
25 | future) combined with the requested speed increases will  
26 |

1 constitute a local safety hazard.

2           This argument disregards substantial evidence to the  
3 contrary contained in the record which forms the basis for the  
4 ALJ's conclusion that no local safety hazard exists. This evidence  
5 includes the fact that the accident rate for Marysville is low (TR  
6 83-86, 99-101, 417-418); it is difficult for trains to make an  
7 emergency stop for vehicles in a crossing at any speed (TR 180-  
8 181); when trains travel faster they occupy a crossing for less  
9 time, thereby reducing exposure and reducing traffic congestion  
10 caused by the crossing closure (TR 61-62); the nationwide report  
11 of accidents/incidents at crossings compiled by the Federal  
12 Railroad Administration shows that rate of accidents/incidents is  
13 significantly higher for trains operating at slower speeds (Ex. 8,  
14 Table 16); the crossings in Marysville are not materially  
15 different from crossings that Amtrak trains operate over  
16 throughout the country at speeds ranging from 79 mph to 100 mph  
17 (TR 55-56); Burlington Northern freight trains operate on the line  
18 between Seattle and Everett at a maximum of 50 mph with no greater  
19 number of accidents on that line as compared to parts of the  
20 Washington coast line where trains operate at slower speeds (TR  
21 83); the track in Marysville is in good condition, meets FRA Class  
22 4 standards and is inspected regularly (TR 352-359, 128, 412, Ex.  
23 4); all of the public grade crossing, with the exception of 88th  
24 Street, are protected with state of the art gates, signals and  
25 activation equipment (TR 146-154); Burlington Northern is

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1 installing such equipment at 88th Street pursuant to their  
2 contract with WSDOT (TR 146-147); all public crossings in  
3 Marysville will have activation equipment which will provide for  
4 a minimum twenty second warning time before the train reaches the  
5 crossing, regardless of train speed (TR 146-147); and projected  
6 future conditions such as increased traffic cannot form the basis  
7 of a conclusion because the Commission must make their conclusions  
8 based on conditions as they exist at the time the petition is  
9 brought.

10 The Commission may rightly question why the City has not  
11 exercised its independent authority to post "DO NOT STOP ON  
12 TRACKS" signs and "DO NOT BLOCK INTERSECTION" signs if their  
13 concerns about crossing safety are in earnest. TR 288-289.

14 2. Deny. The City did suggest that the Railroad relocate  
15 the tracks in Marysville. TR 287. However, the crux of the  
16 argument made here appears to be that the ALJ has erred in not  
17 concluding that increased freight train speeds are not related to  
18 increased passenger speeds and that there is no necessity for  
19 increased train speeds.

20 As outlined in answer to A.1. above, there is substantial  
21 evidence in the record to support the finding that no local safety  
22 hazard exist to prevent freight and passenger trains from  
23 operating safely at the requested speeds in Marysville. The  
24 record also contains credible evidence that freight train speed  
25 increases are necessary to increase capacity on the line to allow  
26

1 passenger trains to run between Seattle and Vancouver, B.C. in  
2 under three hours and fifty-five minutes. TR 42-43, 77-78.

3 3. Deny. Petitioners reiterate the answer to A.1. above and  
4 the arguments contained in Petitioner's Closing Brief in Sections  
5 C. and E.

6 In addition, Petitioner's answer that Mr. Harder's testimony  
7 taken as a whole supports the conclusion that passenger and  
8 freight trains can operate safely at the requested speeds under  
9 the conditions contained in the Initial Order. TR 351-361, 411-  
10 422.

11 4. Deny. This section of the Petition for Review reiterates  
12 two issues the City has already raised, that traffic conditions in  
13 Marysville combined with increased train speeds constitute a local  
14 safety hazard, and that increased freight train speeds are not  
15 necessary.

16 Petitioners refer the Commission to the answers provided to  
17 these issues above.

18 5. Deny. As, the trier of fact, it was the ALJ's duty to  
19 make credibility findings.

20 The credibility findings made by the ALJ on page 10 of the  
21 Initial Order are supported by substantial evidence and should be  
22 affirmed.

23 B. City's Challenge to Findings of Fact

24 Finding of Fact 3. Deny. Finding of Fact 3 is supported by  
25 substantial evidence that freight and passenger train speed  
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1 increases are necessary for resumption of passenger service and  
2 that both freight and passenger trains can operate safely at the  
3 requested speeds. See answers to A.1. and A.2. above.  
4 Substantial evidence does not exits in the record as a whole to  
5 support the City's argument that a local safety hazard exists in  
6 Marysville.

7 The City raises the issue of private crossing safety in their  
8 argument in this section. Petitioners answer that the private  
9 crossings in Marysville are protected by stop signs on each side  
10 of the crossing, one private crossing has gates and signals, the  
11 track is straight and there is little or no vegetation on the  
12 right of way to impair sight distance to see oncoming trains. TR  
13 227-228, 413-415. The history of grade crossing accidents is low.  
14 TR 84-86, 99, 101. Despite the concerns raised by Mr. Ploeger (TR  
15 270-271), the evidence supports the finding that no local safety  
16 hazard exists in Marysville.

17 The Commission does not have jurisdiction over private road  
18 crossings of railroads. The Commission may only exercise those  
19 powers expressly granted by the legislature or necessarily implied  
20 by the Commission's governing statutes, Cole v. Washington  
21 Utilities and Transportation Commission, 79 Wn.2d 302, 306, 485  
22 P.2d 71 (1971), and implicit power exists only to the extent  
23 necessary to execute the expressed power. State ex rel. Puget  
24 Sound Navigation Co. v. Department of Transportation of  
25 Washington, 33 Wn.2d 448, 206 P.2d 456 (1949); see also Tuerk v.  
26



1 Department of Licensing, 123 Wn.2d 120, 124-25, 864 P.2d 1382  
2 (1994); Municipality of Metropolitan Seattle v. Public Employment  
3 Commission, 118 Wn.2d 621, 633, 826 P.2d 158 (1992).

4 Section 80.01.040 RCW, vests in the Commission the powers as  
5 described in Title 81 RCW. Chapter 81.53 RCW creates the  
6 authority to regulate grade crossings. A "grade crossing" is  
7 defined as "any point or place where a railroad crosses a highway  
8 or a highway crosses a railroad." RCW 81.53.010. "Highway" is  
9 defined as "all **state and county** roads, streets, alleys, avenues,  
10 boulevards, parkways and other public places actually open and in  
11 use, or to be opened and used, for travel by the public." Id.  
12 (emphasis added). These definitions limit the Commission's  
13 authority to those railroad crossings where the road is publicly  
14 owned, that is, dedicated and publicly maintained. see State ex  
15 rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla  
16 Co., 5 Wn.2d 95, 99-100, 104 P.2d 764 (1940).

17 The City argues there is a "pattern of catastrophic  
18 derailments" in the area. Counsel for the City asked questions of  
19 witnesses on cross in an attempt to elicit evidence of a  
20 derailment hazard, however such evidence was never produced. TR  
21 102, 196-200. The City offered no direct evidence of a derailment  
22 as a hazard in Marysville. Petitioners offered evidence of  
23 safety measures that have been taken to reduce the risk of  
24 derailment such as failed equipment detectors on the tracks (TR  
25 154-156, 158) and improvements in hazardous materials shipment  
26

1 such as cars with thermal resistance and double head shields (TR  
2 200-201). The State of Washington fell in the second lowest  
3 incident rate nationally, one to twenty incidents, in 1993 (TR  
4 192, Ex. 7, Figure 29) and as between 1988 and 1993, 1992 and 1993  
5 showed the lowest incidence of hazardous materials incidents,  
6 indicating that the risk is decreasing (TR 192-193, Ex. 13, Table  
7 26). The record contains evidence of one derailment north of the  
8 Marysville city limits in 1991 which involved a fire resulting  
9 from a punctured car containing butane. There were no injuries as  
10 a result of this derailment. TR 194-195

11 There is no evidence that the conditions in the community  
12 near the tracks in Marysville is unique. The community is similar  
13 to other communities where passenger and freight trains operate  
14 safely at the speeds requested. TR 55-56, 83. The WUTC staff  
15 evaluated the community surrounding the tracks in Marysville and  
16 concluded that it was safe for trains to operate at the requested  
17 speeds on condition that the improvements be made at the 88th  
18 Street crossing and installation of the "DO NOT STOP ON TRACKS"  
19 signs. TR 354, 418-422.

20 Finding of Fact 4. Deny. Substantial evidence exists to  
21 support Finding of Fact 4. See previous answers and Closing  
22 Briefs of Petitioners and Commission Staff.

23 C. City's Challenge to Conclusions of Law

24 Conclusions of Law 2 and 3. Deny. Conclusions of Law are  
25 supported by substantial evidence that no local safety hazard  
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1 exists. Petitioners do not object to the order being conditioned  
2 upon installation of the crossing improvements at 88th Street and  
3 installation of "DO NOT STOP ON TRACKS" signs.

4 The City's reliance on In Re Centralia, TR 2251 (1990) as  
5 legal authority to deny the requested speed increases in  
6 Marysville is erroneous. The Centralia case is based on the  
7 evidence that school children were trespassing on the tracks in  
8 Centralia. There is evidence that school children in Marysville  
9 use the crossings as pedestrians and bus passengers. TR 377, 380.  
10 The record contains no evidence of trespassing by school children  
11 in Marysville, and hence cannot support a finding that trespassing  
12 school children represent a local safety hazard.

13 D. City's Conclusion

14 The City concludes with the assertion that, "[n]owhere  
15 else in the urban areas of Puget Sound are the actual or projected  
16 train speeds the high velocities sought ... in Marysville." This  
17 assertion is false. Petitioners have sought speed increases  
18 throughout the Seattle to Vancouver, B.C. corridor which when  
19 coupled with existing speed orders could result in freight trains  
20 operating at 50 mph and passenger trains at 79 mph in Blaine,  
21 Ferndale, Burlington, Mount Vernon, Stanwood and Marysville. In  
22 Edmonds passenger trains will operate up to 60 mph and freight  
23 trains up to 50 mph when the conditions of the WUTC's Final Order  
24 are met.

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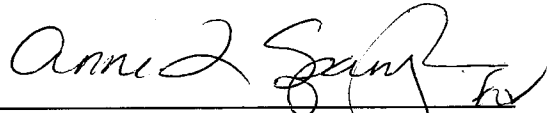
**III. PETITIONER'S AFFIRMATIVE RESPONSE**

The Initial Order is supported by substantial evidence in light of the record as a whole. Petitioners have met the burden of proof to show that passenger and freight trains can operate at the requested speeds commensurate with the hazards presented and the practical operation of trains as required by RCW 81.48.040.

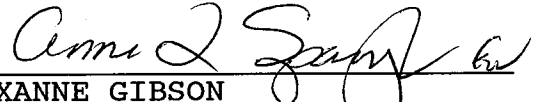
**VI. RELIEF REQUESTED BY PETITIONERS**

Petitioners respectfully request the WUTC to affirm the Initial Order and adopt it as the Commission's Final Order.

RESPECTFULLY SUBMITTED this 24th day of May, 1995.



JEANNE A. CUSHMAN  
Assistant Attorney General  
Attorney for WSDOT



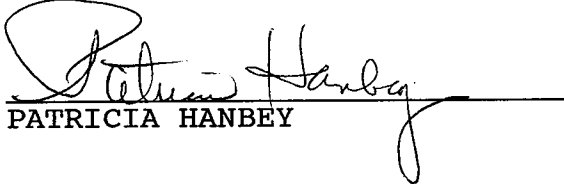
REXANNE GIBSON  
Attorney for Burlington Northern  
(Telephonically approved for  
signature May 24, 1995)

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**CERTIFICATE OF SERVICE**

I personally certify that I have this date served a true copy of the foregoing document upon the persons and entities listed on the Service List below by depositing a copy of said Answer to Petition for Administrative Review in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED this 24th day of May, 1995.

  
PATRICIA HANBEY

**SERVICE LIST**

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true copy of the foregoing document upon the persons and entities listed on the Service List below by personally delivering a copy of said Answer to Petition for Administrative Review to the individuals as shown on said Service List.

DATED this 24th day of May, 1995.

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**SERVICE LIST**

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