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BEFORE THE ARIZONA CORPORATION COMMISSION

9 IN THE MATTER OF THE APPLICATION
 10 OF THE CITY OF FLAGSTAFF TO
 11 UPGRADE EXISTING RAILROAD
 12 CROSSING OF THE BNSF RAILWAY
 13 COMPANY AT STEVES BOULEVARD
 14 AND FANNING DRIVE IN THE CITY OF
 15 FLAGSTAFF, COCONINO COUNTY,
 16 ARIZONA DOT CROSSING NOS. 025099J
 17 AND 025129Y

DOCKET NO. RR-02635B-09-0075

BNSF RAILWAY COMPANY

POST-HEARING BRIEF

August 12, 2009

Arizona Corporation Commission
DOCKETED

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1 **INTRODUCTION**

2 BNSF Railway Company (“BNSF”) hereby submits this Post-Hearing Brief in the
3 above-captioned matter. Pursuant to the July 9, 2009 Procedural Order, each party is
4 required to file a brief addressing the Arizona Corporation Commission’s (“Commission”)
5 authority for public safety at public highway-rail grade crossings within the state, and
6 whether such safety authority is preempted by federal law, both as to the approval of
7 wayside horns installations for use in lieu of a locomotive horn at such crossings, and in
8 determining the safety measures necessary at such crossings when included within a quiet
9 zone established pursuant to Federal Railroad Administrations (“FRA”) rules and
10 regulations. The parties have also been directed to review the specific facts of this case to
11 determine what effect, if any, they may have on the federal preemption analysis over the
12 scope of the Commission’s authority in this proceeding.

13 BNSF respectfully asserts that although the Commission possesses the statutory
14 authority to determine acceptable safety measures at public highway-rail grade crossings
15 in the state of Arizona, federal laws codified by FRA rules and regulations governing the
16 sounding of a locomotive horn at such crossings substantially subsume the subject matter
17 being addressed by this proceeding (mandatory use of locomotive horns at public
18 highway-rail grade crossings). Consequently, the Commission is prohibited by federal
19 law from determining: (1) under what conditions a wayside horn may be installed and
20 used at public highway-rail grade crossings, or (2) the necessary safety measures to be
21 implemented at public highway-rail grade crossings included within a quiet zone.
22 Furthermore, whether or not the City of Flagstaff (the “City”) complied with federal
23 requirements to establish a quiet zone are facts that do not alter the preemption analysis,
24 as the FRA has not delegated any authority to states to approve quiet zone applications,
25 establish acceptable quiet zone risk thresholds for public highway-rail grade crossings

26

1 located therein or determine under what conditions a wayside horn may be used in lieu of
2 a locomotive horn.

3 DISCUSSION

4 **I. The Arizona Legislature has Delegated Authority for Public Safety at Public** 5 **Highway-Rail Grade Crossings Within the State to the Commission.**

6 The Commission's authority over public highway-rail grade crossings is based on a
7 delegation of authority by the Legislature. *Burlington N. and Santa Fe Ry. Co. v. Ariz.*
8 *Corp. Comm'n*, 198 Ariz. 604, 606, 12 P.3d 1208, 1210 (App. 2000). The Commission
9 has no implied powers, and its powers do not exceed those derived from a strict
10 construction of the Constitution and the implementing statutes. *See Commercial Life Ins.*
11 *Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946); *Tonto Creek Estates*
12 *Homeowners Ass'n v. Ariz. Corp. Comm'n*, 177 Ariz. 49, 55, 864 P.2d 1081, 1087 (App.
13 1993). Arizona's statutory scheme governing public highway-rail grade crossings is
14 embodied in A.R.S. §§ 40-336, 40-337, 40-337.01, 40-337.02 and 40-337.03. Pursuant to
15 these statutes, the Commission has the authority to require the use of safety devices, and
16 prescribe the manner of safety, at public highway-rail grade crossings. *Maricopa County*
17 *v. Corp. Comm'n of Ariz.*, 79 Ariz. 307, 312, 289 P.2d 183, 186 (1955); *Southern Pac. Co.*
18 *v. Corp. Comm'n*, 84, Ariz. 365, 329 P.2d 883 (1958). If the required improvements
19 involve automatic warning signals or devices, the Commission shall hold a hearing.
20 *Southern Pacific Transp. Co. v. Arizona Corp. Com'n*, 173 Ariz. 630, 845 P.2d 1125
21 (App. 1992). A.R.S. § 40-337.03 requires that the Commission submit to each railroad, as
22 well as each applicable city, county or department of transportation in which the public
23 crossing is located, by February 15 of each year, an array of public highway-rail grade
24 crossings where the installation of automatic warning signals or devices should be
25 considered during the year.

26

1 BNSF is unaware of any Arizona case law addressing whether the Commission's
2 authority over public highway-rail grade crossings extends to the sidewalks abutting or
3 adjacent to the public roadways that cross the railway line. However, because the
4 collective intent of these statutes is to protect *public health and safety* at public highway-
5 rail grade crossings, it would not be unreasonable to conclude that the Commission's
6 authority also extends to abutting or adjacent pedestrian walkways, thus protecting both
7 pedestrians and those operating motor vehicles.¹ Such an approach to regulating
8 pedestrian crossings is common among the States. This distinction, however, does not
9 alter the preemptive effect of federal regulations on the Commission's authority since the
10 FRA considers abutting or adjacent public sidewalks as part of the public highway-rail
11 grade crossings when determining adequate safety standards within a quiet zone.²
12 Because the pedestrian crossings abut or are adjacent to the public highway-rail crossings
13 in the City's proposed quiet zone, they are not purely pedestrian crossings, and have
14 already been considered in the FRA's rules and regulations establishing adequate safety
15 standards.

16 **II. Federal Preemption – Federal Railroad Safety Act (“FRSA”).**

17 The Supremacy Clause of Article VI of the United States Constitution provides
18 Congress with the power to preempt state law. *See* U.S. Const. Art. VI. cl. 2. Where a
19 state law conflicts with, or frustrates, federal law, the former must give way. *Maryland v.*
20 *Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128, 68 L.Ed.2d, 576 (1981). In the
21 context of railroad safety regulation, the preemptive scope of federal law has been

22 ¹ *Faz v. Ford Motor Credit Co.*, 191 Ariz. 191, 194, 953 P.2d 935, 938 (App. 1997).[When
23 interpreting a statute, Arizona courts will give effect to the legislature's intent].

24 ² CFR Part 222.9 states that “Pedestrian grade crossing means, for purposes of this part, a separate
25 designed sidewalk or pathway where pedestrians, but not vehicles, cross railroad tracks.
26 Sidewalk crossings contiguous with, or separate but adjacent to, public highway-rail grade
crossings are presumed to be part of the public highway-rail grade crossing and are not
considered pedestrian grade crossings.

1 expressly defined by Congress: “laws, regulations, and orders related to railroad
2 safety...shall be nationally uniformed to the extent practicable. A State may...continue in
3 force, a law, regulation, or order related to railroad safety until the Secretary of
4 Transportation...prescribes a regulation or issues an order *covering* the subject matter of
5 the State requirement.” 49 U.S.C. § 20106 (emphasis added).

6 In *CSX Transportation, Inc. v. Easterwood*,³ the United States Supreme Court
7 provided guidance for determining whether a federal regulation covers the same subject
8 matter as a state regulation. The Court stated that a state law will be preempted if the
9 federal regulation “substantially subsumes,” the subject matter of the relevant state law.
10 *Easterwood*, 507 U.S. at 664; *Southern Pacific Transp. Co. v. Pub. Util. Comm. of*
11 *Oregon*, 9 F.3d 807, 812 (9th Cir. 1993). The federal regulation does not have to be
12 identical, however, for preemption to apply. *CSX Transp., Inc. v. City of Plymouth*, 283
13 F.3d 812, 817 (6th Cir. 2002). In determining the preemptive effect of a federal
14 regulation under the FRSA, the subject matter of the state and federal regulations must be
15 accurately defined. Additionally, in determining the subject matter of the state regulation,
16 a court must determine what the state law actually regulates rather than determining what
17 the state’s purpose was in promulgating the regulation. *Easterwood*, 507 U.S. at 675.

18 Relying on analysis set forth in *Easterwood*, the Supreme Court in *Norfolk S. Ry.*
19 *Co. v. Shanklin*⁴ determined that federal regulations addressing the adequacy of warning
20 devices installed at public grade crossings preempted “State and private decisionmaking
21 authority by establishing a federal-law requirement that certain protective devices be
22 installed...” *Id.* at 353. The Federal Highway Administration (“FHWA”) regulations at
23 issue in *Shanklin* required that public crossing built using federal funds be equipped with
24

25 ³ 507 U.S. 658 (1993).

26 ⁴ 529 U.S. 344 (2000).

1 flashing lights and automatic gates, or in a limited number of circumstances, that the
2 FHWA approve the warning devices used at the federally funded public crossings.
3 According to the court, these regulations determined the adequacy of warning devices at
4 public crossings built using federal funds. Any State law that established regulation of
5 that area was preempted by the FHWA regulations.

6 While the FRSA provides that rules regulating railroad safety “shall be nationally
7 uniform to the extent practicable,” States are permitted to adopt a more stringent law,
8 regulation, or order related to railroad safety when the law, regulation, or order “(1) is
9 necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible
10 with a law, regulation, or order of the United States Government; and (3) does not
11 unreasonably burden interstate commerce.” *49 U.S.C. § 20106(a)(2)*. In its pre-hearing
12 brief, Staff stated that the Commission had the authority to impose requirements that met
13 the criteria in *49 U.S.C. § 20106(a)(2)*. This exception to the rule permits state regulation
14 only when local situations are “not capable of being adequately encompassed within
15 uniform national standards.” *Union Pac. R.R. Co., v. Cal. Publ. Util. Comm’n*, 346 F.3d
16 851 (9th Cir. 2003). In determining whether local situations are capable of being
17 addressed by uniform national standards, the question is not whether the local issues have
18 in fact been addressed by a national standard, but whether the situation could be
19 adequately addressed by a national standard. *CSX Transp., Inc. v. Williams*, 406 F. 3d 667
20 (D.C. Cir. 2005). Therefore, in imposing requirements that go beyond what is required in
21 49 C.F.R. part 222, the Commission would have to establish that its regulation was not
22 capable of being addressed by a national standard. In doing so, the Commission would be
23 required to present evidence suggesting the safety hazard it is addressing is materially
24 different than similar safety hazards experienced at other railroad crossings across the
25 nation. *Union Pacific*, 346 F. 3d at 861; *But cf. State Ex Rel. Util. Comm’n v. Seaboard*,
26 303 S.E.2d 549 (N.C. App. 1983). BNSF does not believe that the specific facts in this

1 case would give rise to an assertion of Commission jurisdiction over an “essentially local”
2 safety hazard.

3 **A. FRA Regulations Governing Use of Locomotive Horns.**

4 In 1994, Congress passed 49 U.S.C. Sec. 20153 [“Audible Warnings at Highway-
5 Rail Grade Crossings”], mandating the use of locomotive horns at public highway-rail
6 grade crossings nationwide. This law was passed to address safety concerns over an
7 increased number of motor vehicle accidents where local municipalities had, by local
8 ordinance, created quiet zones. 49 U.S.C. Sec. 20153(b) provides that “The Secretary of
9 Transportation shall prescribe regulations requiring that a locomotive horn shall be
10 sounded while each train is approaching and entering upon each public highway rail grade
11 crossing.” Section 20153(c) allows the Secretary of Transportation to determine any
12 exceptions to the requirement found in Section 20153(b), and upon what conditions such
13 exceptions will be allowed. This authority has been delegated to the FRA pursuant to 49
14 CFR 1.49.

15 In 2005, the FRA adopted a comprehensive set of rules and regulations that, among
16 other things, mandates the use of a locomotive horn when approaching public highway-
17 rail grade crossings, and the exceptions thereto. *See* 49 CFR parts 222 and 229. The
18 purpose of the regulation is to “provide for safety at public highway-rail crossings by
19 requiring locomotive horn use at public highway-rail crossings except in quiet zones
20 established and maintained in accordance with this part.”⁵ 49 CFR part 222.1.
21 Locomotive horns must be used when approaching a public highway-rail grade crossing.
22 49 CFR part 222.21. There are two exceptions to this mandatory rule: (1) when trains
23 enter an established quiet zone, and (2) when a wayside horn conforming to the

24 ⁵ In its June 9, 2009 Pre-Hearing Brief, Staff states that “Quiet Zone” rules are not a safety
25 standard. However, the FRA’s audible warning rules, from which exceptions such as the
26 establishment of a quiet zones are made, is a uniform safety standard issued pursuant to 49 U.S.C.
Sec. 20153 under the Federal Railroad Safety Act.

1 requirements of 49 CFR part 222, appendix E is used in lieu of the locomotive horn. 49
2 CFR parts 222.39 and 222.59.

3 **B. Express Preemption of State Law**

4 49 CFR part 222.7(a) specifically provides that “Except as provided in paragraph
5 (b) of this section, issuance of this part *preempts* any State law, rule, regulation, or order
6 governing the sounding of the locomotive horn at public highway-rail grade crossings, in
7 accordance with 49 U.S.C. 20106.” *See Kuntz v. Ill. Cent. R.R. Co.*, 2006 WL 3314432
8 (S.D. Ill. 2006).

9 1. Quiet Zones

10 Quiet zones are established as exceptions to the mandatory sounding of a
11 locomotive horn when trains approach a public highway-rail grade crossing. During
12 cross-examination, Commission witness Chris Watson conceded that the Commission rule
13 governing the sounding of a locomotive horn at public highway-rail grade crossings is
14 preempted. Transcript (“TR”) at 185; *see also* March 27, 2009 Staff Report at 4 [“The
15 federal rule preempts all applicable state laws, regarding the sounding of locomotive
16 horns at highway-rail crossings.”]. The preemptive effect of the regulation also extends to
17 issues concerning safety at public highway-rail grade crossings located within quiet zones.
18 49 CFR part 222.7(d) states:

19 “However, except for the SSMs and ASMs implemented at
20 highway-rail grade crossings described in §222.3(c) of this
21 part, inclusion of SSMs and ASMs in this part *does constitute*
22 *federal preemption* of State law concerning the sounding of
the locomotive horn *in relation to the use of those*
measures.” [Emphasis added].⁶

23 This demonstrates a clear intent by the FRA to ‘occupy the field’ and pre-determine, using
24

25 ⁶ “Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule,” 70 Federal Register
26 80 (April 27, 2005), at 21857 [“...FRA does not plan to delegate any authority to approve quiet
zone applications or to establish acceptable quiet zone risk thresholds.”]

1 a complex set of data matrixes, risk indexes and formulae, what federal safety
2 requirements at public highway-rail grade crossings are adequate and necessary for the
3 establishment of a quiet zone. On cross-examination, Mr. Watson agreed.

4 Q. What is Staff's position concerning who determines
5 the safety standards at public at-grade crossings to be
6 included in quiet zones?

7 A. It's Staff's position that FRA regulates those.

8 TR at 163. No party has submitted evidence to the contrary, and Staff concedes that even
9 if the Commission had the authority to order more stringent safety standards at these
10 crossings, "The potential exists that reaching such a conclusion would implicitly represent
11 a rejection of implementing Quiet Zone and would appear to be inconsistent with the
12 federal rule." Staff Pre-Hearing Brief at 6. In light of this inconsistency, state law
13 granting the Commission authority over safety at public highway-rail grade crossings
14 must give way to the applicable federal rules in this instance.

15 2. Wayside Horns

16 49 CFR part 222.59(a)(1) states that "A wayside horn conforming to the
17 requirements of appendix E of this part may be used in lieu of a locomotive horn at any
18 highway-rail grade crossing equipped with an active warning system consisting of, at a
19 minimum, flashing lights and gates." The FRA has determined that a wayside horn will
20 be considered a one-for-one substitute for the locomotive horn.⁷ TR at 185. Therefore, it
21 should logically follow that if the FRA allows the use of a wayside horn as a one-for-one
22 substitute for a locomotive horn when approaching public highway-rail grade crossings
23 (provided certain safety devices are in use), any Commission action that would impose
24

25 ⁷ "Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule," 70 Federal Register
26 80 (April 27, 2005), p. 21845.

1 conditions to, or even deny, such use would frustrate federal law covering the same
2 subject (CFR 49 part 222), and is therefore preempted. The following exchange during
3 Mr. Watson's cross-examination suggests that Staff recognizes the paradox in arguing, on
4 the one hand, that the Commission retains the authority to determine the safety-related
5 circumstances under which wayside horns can be installed and used in Arizona, while at
6 the same time, conceding that the FRA's rules and regulations preempt state law
7 governing the use of a locomotive horn.⁸

8 Q. Would you agree – and I think you earlier testified –
9 that the FRA has determined that a wayside horn
10 would be considered a one-for-one substitute for a
11 locomotive horn?

11 A. I would.

12 Q. And so if the FRA's requirements for the use of that
13 wayside horn are met, I will again ask, what if the
14 Commission were to disapprove this particular
15 application?

15 A. What's your question?

16 Q. Would that not frustrate the FRA rule concerning a
17 one-for-one substitute?

17 A. *I guess it would in a roundabout way.* There's also
18 something in that rule about if the State has – how do
19 they say it? If the State has procedures in place for
20 upgrading crossings that affect the crossing, that can't
21 be preempted.

20 Q. Well, let me follow up on that. Does the rule use the
21 term "administrative procedures"?

22 A. I believe it does.

23
24 ⁸ If the Commission imposed safety conditions on the installation and use of wayside horns in this
25 proceeding beyond what is required by the federal rule, then a wayside horn would no longer be
26 just a one-for-one substitute, at least in Arizona. It would be the wayside horn *plus* other safety
improvement to substitute the locomotive horn use. This would frustrate a national uniform
federal scheme.

1 TR at 185-186.

2 49 CFR part 222.59 sets forth the administrative procedure for installation of
3 wayside horns. Nothing in this section suggests that a Public Authority or railroad must
4 receive approval from the State agency responsible for public highway-rail grade crossing
5 safety; only that the agency receive notice. That section of the FRA's audible warning
6 rules that Mr. Watson referred to during his testimony is 49 CFR part 222.7(e), which
7 states that "Issuance of this part does not constitute federal preemption of administrative
8 procedures required under State law regarding the modification or installation of
9 engineering improvements at highway-rail grade crossings." However, installation of a
10 wayside horn does not represent an engineering "improvement" over the safety devices
11 used at a particular public highway-rail grade crossing; it is a one-for-one substitute for
12 the locomotive horn, which is a safety device as well. More importantly, however, is that
13 the Commission's hearing process, and any resulting decision, is not the result of an
14 administrative act or procedure.⁹ *Arizona Public Service Co. v. Southern Union Gas Co.*,
15 76 Ariz. 373, 377, 265 P.2d 435, 438 (1954) [the corporation commission in rendering its
16 decision acts judicially]; *Johnson v. Betts et al., Corporation Commission*, 21 Ariz. 365,
17 371, 188 P. 271, 273 (1920) ["The commission, in hearing evidence in proof of the charge
18 laid against appellant, and evidence submitted by appellant in rebuttal thereof, and in
19 coming to a decision of the question, was acting in a judicial or quasi judicial
20 capacity..."]. As a result, 49 CFR part 222.7(e) is not applicable when viewed against the
21 quasi-judicial nature of this proceeding.

22 Wayside horn installations must conform to the requirements in appendix E of 49
23 CFR part 222, which sets forth 'minimum' requirements. Minimum safety requirements

24
25 ⁹ Administrative procedures at the Commission are generally handled by Staff, such as the
26 approval of corporate names and entities, or review and approval of water main line extension
agreements.

1 include the presence and use of flashing lights and gates at public highway-rail crossings
2 before a wayside horn can be used. 49 CFR part 222.59(a)(1). Arguably, the
3 Commission might consider the safety of any public highway-rail grade crossing where a
4 wayside horn is already in use, and determine that such public crossing is unsafe pursuant
5 to its delegated state authority. For instance, if the Commission believes that a pedestrian
6 walkway abutting or adjacent to a public highway-rail grade crossing is unsafe –
7 irrespective of horn use – *Shanklin* suggests that the Commission could order further
8 improvements (i.e. full barrier), but not as a condition of approving the use of a wayside
9 horn.¹⁰ Should the state make such a determination, it would be free to install more
10 protective devices at public crossings using its own funds or funds from the FHWA.
11 *Shanklin*, 529 U.S. at 358. Regardless, the Commission still does not retain the authority
12 to determine whether a public highway-rail grade crossing is safe *enough*, or require any
13 safety improvements thereto, as conditions for use of a wayside horn – or establishment of
14 a quiet zone. Nor can the Commission determine whether the applicable FRA regulations
15 are inadequate. *CSX Transp., Inc. v. Williams* 406 F. 3d 667, 672.

16 Furthermore, while the minimum safety standards for use of a wayside horn may
17 give rise to the Commission’s ability to require safety standards more stringent than what
18 is required by 49 CFR part 222.59 and appendix E, this would only apply if the wayside
19 horn is used at a public highway-rail grade crossing located outside a quiet zone; federal
20 safety standards under the quiet zone establishment exception in 49 CFR part 222
21 substantially subsume the subject matter, and do not establish ‘minimum’ standards.
22 Therefore, since the public highway-rail grade crossings at Steves Boulevard and Fanning
23
24

25 ¹⁰ Similar to Staff’s discussion in its Pre-Hearing Brief with respect to quiet zones, there would
26 have to be some additional source of hazard other than the use of a wayside horn for state
jurisdiction to apply.

1 Drive fall within the City's proposed quiet zone, the Commission is without recourse to
2 order further safety improvements.

3 In 2008, the Washington State Utilities and Transportation Commission ("WUTC")
4 issued two orders that involved the installation of wayside horns. On September 24, 2008,
5 the WUTC's Secretary issued an order approving an application by the Washington State
6 Department of Transportation (WSDOT) to modify a railroad-highway grade crossing that
7 included, among other things, the installation of wayside horns. See WUTC Order 01,
8 Docket TR-081232, attached hereto as Exhibit A. In the case before the Commission, the
9 City is proposing to install wayside horns without other improvements at the Steves
10 Boulevard and Fanning Drive crossings. By contrast, the WSDOT proposed to realign
11 and relocate tracks and an existing cantilever, retrofit LED flashing lights on the
12 cantilever, upgrade to a modern constant warning time units and install control turn signs.
13 *Id.* at 3. Clearly, except for the installation of wayside horns, the other numerous
14 modifications and upgrades to the public crossing did not involve an application of the
15 FRA's train horn rule and required WUTC approval. Furthermore, unlike the public
16 highway-rail grade crossings at Steves Boulevard and Fanning Drive, the public highway-
17 rail crossing at issue before the WUTC was not included to be included within a quiet
18 zone.

19 On October 8, 2008, the WUTC's Secretary issued an order approving an
20 application by the Town of Steilacoom ("Town") to install a wayside horn at the
21 Sunnyside Beach pedestrian-only railroad grade crossing. See WUTC Order 01, Docket
22 No. TR-081743, attached hereto as Exhibit B. In this WUTC proceeding, the crossing at
23 issue was a pedestrian-only crossing. Because 49 CFR part 222 applies only to public
24 highway-rail grade crossings and private or pedestrian-only crossings within a quiet zone,
25 federal preemption did not apply, and the WTUC was free to address the application
26 under State law.

1 While these two WUTC cases were decided pursuant to applicable state laws, the
2 facts in each case can be distinguished from the pending matter. Because the Steves
3 Boulevard and Fanning Drive crossings in this proceeding are public highway-rail grade
4 crossings included within a proposed quiet zone, the installation of wayside horns fall
5 under federal guidelines and procedures.

6 **III. City's Efforts to Designate a Quiet Zone Under 49 CFR Part 222.39(a).**

7 The City began the process of establishing a quiet zone sometime in approximately
8 2004. TR at 16. In 2005, the City hired the firm Gannet Fleming to study and design the
9 quiet zone. *Id.* On May 6, 2006, a diagnostic team comprising of members from the
10 City's engineering staff, the Commission's railroad safety division and BNSF met on-site
11 to review and discuss various safety measures for the five crossings to be included within
12 the quiet zone. City Application ("Application") at 2. A January 22, 2007 revised report
13 entitled "Quiet Zone/Wayside Horn Update December 2006" was mailed to each
14 diagnostic team participant. *Id.* Subsequently, the Flagstaff City Council approved the
15 current project on two separate occasions. TR at 16. On March 14, 2008, the City sent
16 the NOI pursuant to 49 CFR Part 222.43 to BNSF, the Commission and the Arizona
17 Department of Transportation. Application at 2. The City did not provide the NOI to
18 Amtrak, which City officials conceded was an oversight. TR at 112. Otherwise, there do
19 not appear to be any deficiencies in the NOI.

20 It appears that the City sought to establish a quiet zone pursuant to 49 CFR part
21 222.39(a)(3), which states that "A quiet zone may be established if SSMs are
22 implemented which are sufficient to reduce the Quiet Zone Risk Index to a level at or
23 below the Risk Index With Horns." In this process, no formal application is filed with the
24 FRA's Associate Administrator ("AA") for approval; the City must merely demonstrate
25 that the safety measures deployed, or that will be deployed, at the public highway-rail
26 grade crossings located within the proposed quiet zone falls below a certain risk index.

1 Understandably, this may cause some concern with one or more Commissioners in
2 knowing that quiet zones can be established without formal approval by the FRA.
3 However, nothing in the applicable FRA rules grant the Commission any authority to
4 determine if a public authority¹¹ has met the requirements of 49 CFR part 222.39(a). In
5 response to states' concerns, the FRA adopted the 60-day comment period after receipt of
6 an NOI:

7 “Paragraph (b)(2), which has been added to the final rule,
8 establishes a 60-day comment period on the Notice of Intent.
9 This comment period was added in response to comments
10 requesting that the rule be revised to *provide opportunities for*
11 *State agencies and railroads to provide input during the quiet*
12 *zone development process.* Under paragraph (b)(2)(i), any
13 party that receives a copy of the Notice of Intent may submit
14 information or comments about the proposed quiet zone to the
15 public authority during the 60-day period after the date on
16 which the Notice was mailed. *Even though the public*
17 *authority would be well advised to carefully consider any*
18 *thoughtful and well-reasoned comments received, FRA will*
19 *not require the public authority to take any action in*
20 *response.*” [Emphasis added].¹²

21 Also in response to similar concerns, the FRA adopted regulations that implement
22 a procedure to recognize applicable state agencies seeking to play an even larger role in
23 the creation of quiet zones within their jurisdictions. 49 CFR part 222.17 allows any state
24 agency responsible for highway-rail grade crossing safety, or highway and road safety, to
25 become a recognized State agency upon approval by the FRA's AA. Despite this
26 recognition, the FRA expressly reserved the authority to approve quiet zones at the federal
level.

22 ¹¹ A “Public authority” is defined as “the public entity responsible for traffic control or law
23 enforcement at the public highway-rail grade or pedestrian crossing.” 49 CFR Part 222.9. This
24 definition does not include entities responsible for safety at public highway-rail grade crossings.
25 “Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule,” 70 Federal Register
26 80 (April 27, 2005), at 21855. In this case, the public authority is the City of Flagstaff.

¹² “Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule,” 70 Federal Register
80 (April 27, 2005), at 21846.

1 “After considering these comments, FRA decided to create a
2 process by which State agencies who are interested in having
3 a greater role in quiet zone development can provide
4 assistance to FRA throughout the quiet zone development
5 process. As suggested by the North Carolina Department of
6 Transportation, recognized State agencies could serve as
7 clearinghouses for proposed quiet zones by coordinating quiet
8 zone creation and verifying local compliance with FRA
9 regulations and State laws and administrative rules.
10 *However, as stated above, FRA does not plan to delegate
11 any authority to approve quiet zone applications or to
12 establish acceptable quiet zone risk thresholds.*” [Emphasis
13 added.]¹³

14 Despite Staff’s testimony concerning the alleged ineffectiveness of the FRA’s
15 “recognized state agency” provision in its audible warning rules, it is nonetheless the
16 procedure (along with the 60-day comment period) by which states can play a larger role
17 in the establishment of quiet zones.

18 For instance, in this proceeding there is some question concerning the accuracy of
19 the U.S. Department of Transportation Crossing Inventories that are relied upon when
20 running the FRA Calculator to determine if a proposed quiet zone meets the Quiet Zone
21 Risk Index (“QZRI”) safety threshold level. In Staff’s July 29, 2009, Affidavit of Chris
22 Watson, Staff expresses the opinion that these forms will need to be corrected before the
23 City’s proposed quiet zone can go into effect. However, Mr. Watson does not provide any
24 reference to a specific FRA rule or regulation that states this to be the case. If anything,
25 these incorrect inventories highlight the need for the Commission to obtain ‘recognized
26 agency’ status from the FRA so it can act as a clearinghouse for quiet zone NOIs that
 involve public highway-rail grade crossings within the state. Nonetheless, the
 Commission cannot make a determination as to when quiet zones are established, and
 under what conditions.

¹³ *Id.* at 21857.

1 With regards to Staff's July 29, 2009 filing, it appears that Staff's use of the FRA's
2 Quiet Zone Calculator was incorrect. First, Staff ran the Calculator using all five
3 crossings; two of the crossings will utilize wayside horns. However, 49 CFR part 222,
4 appendix C states: "Wayside Horns: Crossings with wayside horn installations will be
5 treated as a one for one substitute for the train horn and are not to be included when
6 calculating the Crossing Corridor Risk Index, the Risk Index with Horns or the Quiet
7 Zone Risk Index." Both the City and BNSF ran the Calculator using only three crossings,
8 though BNSF submitted one calculation using all five crossings to demonstrate that the
9 use of wayside horns has no bearing on the QZRI. Furthermore, the accuracy of the U.S.
10 DOT Crossing Inventories did not have any effect on the QZRI calculations submitted by
11 BNSF and the City on July 29, 2009, or the calculation included in the NOI. In all
12 instances, the safety feature used under the category "Warning Device" was "Gates," not
13 "4-quad gates" or "Full Barrier" as may have been incorrectly noted in the U.S. DOT
14 Crossing Inventories. As to the three scenarios reviewed by Staff, BNSF does not
15 understand why a scenario that does not exist would be analyzed, as it has no bearing to
16 the facts of this case.

17 CONCLUSION

18 BNSF does not seek to minimize the important role that the Commission and
19 railroads play in assisting local municipalities when they consider whether or not to
20 establish quiet zones. BNSF recognizes that the use of wayside horns and the
21 establishment of quiet zones are relatively new issues for the Commission, and is
22 participating in this proceeding in order to help facilitate thoughtful and healthy
23 discussion as to the Commission's role. As addressed herein, the FRA has adopted a
24 comprehensive set of regulations and guidelines that govern the use of locomotive horns
25 or wayside horns at public highway-rail crossings, and the acceptable SSMs or ASMs
26 required in lieu thereof. Furthermore, determining acceptable quiet zone risk thresholds

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2226028.1/83510.428

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BNSF Railway Company
Post-Hearing Brief
August 12, 2009

Exhibit A

- 4 Prior to the involvement of WSDOT in this project, Sound Transit petitioned the Commission in docket number TR-061196 for approval to make various modifications to the 100th Street Southwest crossing. The Commission approved Sound Transit's petition on September 22, 2006. The proposed modifications approved in docket number TR-061196 were never completed and are now incorporated into the modifications proposed in this docket.
- 5 Respondents Tacoma Rail, Sound Transit and the City of Lakewood have consented to entry of an Order by the Commission without further notice or hearing.
- 6 100th Street Southwest is a secondary arterial with four lanes of travel; two eastbound and two westbound. There is also a left turn pocket for westbound traffic. WSDOT reports average annual daily vehicle traffic over the crossing at 23,050 in 2006, with 4.6 percent of the traffic involving commercial motor vehicles at the afternoon peak. The crossing is part of an established school bus route involving 34 buses per weekday. The average annual daily vehicle traffic is expected to increase to 31,580 by 2020. The posted speed limit is 35 miles per hour.
- 7 The current crossing has an active main line and an inactive, disconnected portion of a second track. BNSF Railway Company (BNSF Railway) and Tacoma Rail currently operate two freight trains over the crossing four or five days per week. Current speed limit for the trains is 10 miles per hour. No passenger trains operate at the crossing at this time. Train traffic and train speeds are expected to increase substantially in the future. Freight trains operated by BNSF Railway and Tacoma Rail will continue at two per day but train speeds will increase to 40 mph. Sound Transit and Amtrak will initiate passenger service over this crossing upon completion of the project. Average daily passenger train traffic is expected to be 36 per day. Some passenger trains will operate at the authorized speed of 79 mph and others will operate at lower speeds.
- 8 WSDOT proposes to realign and relocate the tracks 30 feet east of the current location of the crossing. There will be two active main lines on approximately 15 foot track centers at this new location.
- 9 Current warning devices at the crossing include cross-bucks and cantilever-mounted flashing lights on each approach. The lights are interconnected with the traffic signal at the intersection of 100th Street SW and Lakeview Avenue. The existing train detection circuitry is motion sensors.

- 10 The realignment, reconstruction of tracks and future proposed use of this crossing presents a number of significant challenges. In order to address public safety concerns and other issues, WSDOT and Sound Transit organized a diagnostic team consisting of representatives of all major stakeholder groups. The diagnostic team met on-site in September 2006, and provided valuable input and specific recommendations to WSDOT, Sound Transit and the contracted design engineers. The resulting construction design is consistent in all major components to the recommendations of the diagnostic team.
- 11 Modifications to the existing warning devices include relocating the existing east approach cantilever approximately 40 feet further east to accommodate construction of the new second main line. LED flashing light units will also be retrofitted on this cantilever. A new cantilever will be installed on the west approach and gates will be installed on both approaches.
- 12 The control equipment for the railroad warning devices will be upgraded to modern constant warning time units, including replacing the existing bungalow and hardware. The new circuitry will allow additional advanced preemption time. The interconnection between the rail crossing and traffic signals will be upgraded to a six-wire supervisory configuration. Active "No Right Turn" blank-out signs are proposed to control turns at the intersection of 100th Street and Lakeview Avenue SW in appropriate phases of preemption.
- 13 Medians will be installed east and west of the crossing to discourage driving around the gates and other illegal or risky motorist behavior. A "C" curb extension in the northeast quadrant will be modified to allow large trucks easier turning movements.
- 14 Sidewalks on both sides of the crossing will be installed to provide safe pedestrian travel over the crossing.
- 15 WSDOT also proposes to install wayside horns as a one-for-one substitution of the traditional train horn. With higher speed train operations, the train horn would begin sounding farther from the crossing, near residential areas and schools. The installation of wayside horns will confine the sound near the crossing and minimize noise in areas where an audible warning is not needed for safety purposes. Horns are proposed to be installed in the northeast and southwest quadrants. Indicator lights are proposed to be installed on top of the cantilever masts high enough so that train engineers can see them from a distance.

- 16 The proposed upgrades are in the interest of improving passenger train service in Washington and providing for the safety and convenience of roadway users.

FINDINGS AND CONCLUSIONS

- 17 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington having jurisdiction over public railroad-highway grade crossings within the state of Washington. *Chapter 81.53 RCW.*
- 18 (2) The proposed modifications of this crossing involve a public railroad-highway grade crossing, as defined in RCW 81.53.010.
- 19 (3) RCW 81.53.261 requires that the Commission grant approval prior to modifying a public railroad-highway grade crossing within the state of Washington.
- 20 (4) Commission Staff investigated the petition and recommends that it be granted with the conditions identified below.
- 21 (5) After examination of the petition filed by the Washington State Department of Transportation on July 2, 2008, and giving consideration to all relevant matters and for good cause shown, the Commission grants the petition.

ORDER

THE COMMISSION ORDERS:

- 22 The petition of the Washington State Department of Transportation to modify a railroad-highway grade crossing at the intersection of 100th Street Southwest and Sound Transit's tracks in the city of Lakewood is granted, as follows:
- (1) The modifications must substantially conform to those described in the petition and detailed in the design drawings. Due to the complexity of this project, design changes are inevitable. Petitioner is authorized to make minor changes as necessary for successful completion of the project on the condition that Commission Staff is consulted on safety-related changes.

- (2) Traffic control devices must comply with all applicable standards specified in the U.S. Department of Transportation *Manual on Uniform Traffic Control Devices*.
- (3) Traffic control devices and instrument housing must be installed in such a manner as to provide required clearances from both the roadway and railroad tracks.
- (4) The installation of wayside horns is approved in concept. Actual placement of the horns and indicator lights are subject to approval of a diagnostic team which includes, at a minimum, Commission Staff, Sound Transit, WSDOT, the wayside horn vendor, and the City of Lakewood.
- (5) Petitioner must notify Commission Staff within 30 days upon completion of this modification project.
- (6) TR-081232 Order 01 supersedes Order 01 in Docket TR-061196.

The Commissioners have delegated authority to the Secretary to enter this Order pursuant to RCW 80.01.030 and WAC 480-07-904((1)(b)).

DATED at Olympia, Washington, and effective September 24, 2008.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Executive Director and Secretary

NOTICE: This is an order delegated to the Secretary for decision. In addition to serving you a copy of the decision, the Commission will post on its Internet Web site for at least fourteen (14) days a listing of all matters delegated to the Secretary for decision. You may seek Commission review of this decision. You must file a request for Commission review of this order no later than fourteen (14) days after the date the decision is posted on the Commission's Web site. The Commission will schedule your request for review for consideration at a regularly scheduled open meeting. The Commission will notify you of the time and place of the open meeting at which the Commission will review the order.

The Commission will grant a late-filed request for review only on a showing of good cause, including a satisfactory explanation of why the person did not timely file the request. A form for late-filed requests is available on the Commission's Web site.

This notice and review process is pursuant to the provisions of RCW 80.01.030 and WAC 480-07-904(2) and (3).

DOCKET NO. RR-02635B-09-0075
BNSF Railway Company
Post-Hearing Brief
August 12, 2009

Exhibit B

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

In the Matter of the Petition of)	DOCKET TR-081743
)	
TOWN OF STEILACOOM,)	ORDER 01
)	
Petitioner.)	ORDER GRANTING PETITION TO
)	INSTALL WAYSIDE HORNS AT THE
BNSF RAILWAY COMPANY,)	SUNNYSIDE BEACH PEDESTRIAN-
)	ONLY CROSSING
)	
Respondent.)	
)	USDOT: 085754X
)	UTC: 1K14.94
.....)	

BACKGROUND

- 1 On September 23, 2008, the Town of Steilacoom (Steilacoom or Petitioner) filed with the Washington Utilities and Transportation Commission (Commission) a petition seeking approval to install wayside horns at the Sunnyside Beach pedestrian-only railroad grade crossing. The crossing is identified as USDOT 085754X.
- 2 The Petitioner seeks to eliminate the train's horn that sounds as it approaches and travels through this crossing. The crossing does not currently qualify as a "Quiet Zone" as provided under current Federal Railroad Administration rules and regulations, so the railroad must sound its horn unless a wayside horn is installed. Wayside horns are stationary horn systems mounted at the crossing and activated by the highway-railroad warning system. Wayside horns deliver a targeted blast of sound toward on-coming vehicle traffic and pedestrian users of the crossing. The result is a more focused horn sound at the crossing which helps alleviate the traditional train horn noise in neighborhoods located near the tracks.
- 3 The Sunnyside Beach railroad crossing is a pedestrian-only crossing. Railroad warning devices consist of 12" flashing lights, STOP signs, crossbucks, and pavement markings. The Town of Steilacoom estimates that up to 70 pedestrians cross the Sunnyside Beach tracks per day during peak summer months and as few as ten users per day during the winter months.
- 4 Approximately 42 freight trains per day travel the tracks at 50 miles per hour. In addition, 8 passenger trains travel the tracks each day at 79 miles per hour.

5 The proposed wayside horns will be mounted on poles located in the same quadrants as
the flashing lights at the crossing. A remote confirmation signal will be installed 439 feet
to the northeast of the crossing on the outside of the curve of the track to address sight
restrictions. Two additional dual confirmation signals will be installed on the same poles
with the wayside horns. The wayside horns will be aimed across the tracks at the crossing
to minimize the impact of the 92 decibel horn sound on the nearby pedestrians.

6 On September 10, 2008, the Respondent consented to entry of an Order by the
Commission without further notice or hearing.

FINDINGS AND CONCLUSIONS

- 7 (1) The Washington Utilities and Transportation Commission is an agency of the
State of Washington having jurisdiction over public railroad-highway grade
crossings within the state of Washington. *RCW 81.53.*
- 8 (2) The grade crossing at the intersection of the Sunnyside Beach pedestrian crossing
and the Petitioner's tracks, identified as USDOT 085754X, is a public railroad
crossing within the state of Washington.
- 9 (3) RCW 81.53.261 requires that the Commission grant approval prior to any changes
to public railroad grade crossings within the state of Washington. *See also 480-
62-150.*
- 10 (4) Commission Staff investigated the petition and recommended that it be granted,
provided that upon completion of the construction, the Petitioner notifies the
Commission. The crossing is subject to inspection by Commission Staff,
verifying that it is in full compliance with applicable laws and regulations.
- 11 (5) After reviewing the petition filed on September 23, 2008, and giving due
consideration to all relevant matters and for good cause shown, the Commission
grants the petition.

ORDER

THE COMMISSION ORDERS:

- 12 The Town of Steilacoom's petition to install wayside horns at a highway-railroad grade crossing, located at the Sunnyside Beach pedestrian crossing and BNSF Railway Company tracks, is granted.
- 13 The Petitioner must notify the Commission upon completion of the installation. The crossing is subject to inspection by Commission Staff, to verify that it is in full compliance with applicable laws and regulations.

The Commissioners have delegated authority to the Secretary to enter this Order pursuant to RCW 80.01.030 and WAC 480-07-904((1)(a)).

DATED at Olympia, Washington, and effective October 8, 2008.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Executive Director and Secretary

NOTICE: This is an order delegated to the Secretary for decision. In addition to serving you a copy of the decision, the Commission will post on its Internet Web site for at least fourteen (14) days a listing of all matters delegated to the Secretary for decision. You may seek Commission review of this decision. You must file a request for Commission review of this order no later than fourteen (14) days after the date the decision is posted on the Commission's Web site. The Commission will schedule your request for review for consideration at a regularly scheduled open meeting. The Commission will notify you of the time and place of the open meeting at which the Commission will review the order.

The Commission will grant a late-filed request for review only on a showing of good cause, including a satisfactory explanation of why the person did not timely file the request. A form for late-filed requests is available on the Commission's Web site.

This notice and review process is pursuant to the provisions of RCW 80.01.030 and WAC 480-07-904(2) and (3).