

## BEFORE THE OFFICE OF THE COMMISSIONER OF RAILROADS

## STATE OF WISCONSIN

In the Matter of the:

Petition of the Wisconsin & Southern Railroad Co. for the Closure of Three Public Crossings of the Tracks Owned by the Union Pacific Railroad Co. and Operated by the Wisconsin & Southern Railroad Co. with S. Brearly Street, S. Livingston Street, and S. Blount Street in the City of Madison, Dane County

9170-RX-242

## PROPOSED DECISION

On April 3, 2009, the Wisconsin & Southern Railroad Co. (WSOR) filed a petition with the Office of the Commissioner of Railroads (OCR) under ss. 195.28 and 195.29 Stats., for the closure of one or more of three public at-grade crossings of tracks owned by the Union Pacific Railroad Co. (UP) and operated by the WSOR with Brearly Street (crossing no. 177 831B / MP 138.98), Livingston Street (177 827L / MP 138.73), and Blount Street (177 823J / MP 138.60) in the City of Madison, Dane County.

The hearing in this matter was previously scheduled for September 27-28, 2011. That hearing was postponed on September 13, 2011 at the request of the railroad with the concurrence of the other parties.

Pursuant to due notice, public hearing was held in this matter on February 15-16, 2012 in Madison, Wisconsin with hearing examiner Douglas S. Wood presiding.

**Post-hearing motions.** Subsequent to the hearing, the City of Madison filed two evidentiary motions. The City raised one of its objections, but not the other, during the hearing. The hearing examiner sets forth his rulings below. The OCR's rules also allow parties to submit "comments explaining their position [on evidentiary rulings] to the commissioner during the period set for receiving comments on the proposed order". §RR 1.06 (4), so the City can renew these objections in its comments on the proposed decision, if it so desires.

The **first motion** seeks to exclude the conclusions and recommendations of OCR investigator Thomas Clauder from evidence. The motion to exclude the opinions is **denied**.

The OCR's procedural rules state, "Members of the office staff appear neither in support of nor opposition to any cause, but solely to discover and present facts pertinent to the issues." Wis. Admin. Code §RR 1.04 (5). The investigator testified that in his opinion the S. Livingston Street and S. Brearly Street crossings should be closed. This opinion testimony in support of the railroad's petition is contrary to the rule.

However, the City's motion incorrectly treats §RR 1.04 (5) as a rule of evidence. The rule does not give parties a basis for evidentiary objections. Nor does the violation of the rule mean that opinions given by

OCR staff must be struck from the record. The OCR's decision in this matter must be based on substantial evidence in the record considered as a whole. The admission of these opinions was a procedural error, but one that did not impair the fairness of the proceedings.

The City's **second motion** seeks to exclude testimony of the railroad's expert witness, Albert Klais, to the extent that it exceeds the scope of his written report. The motion is **denied**.

The City's main grievance, as expressed in its motion, is that Klais buttressed his testimony in support of the crossing closures by relying on criteria set forth in a Federal Highway Administration (FHWA) *Handbook*, the *Railroad-Highway Grade Crossing Handbook - Revised Second Edition August 2007* (FHWA-SA-07-010) (hereafter, *Handbook*).<sup>1</sup> The *Handbook's* abstract describes it as a collection of "prevalent and best practices as well as adopted standards relative to highway-rail grade crossings" in "a single reference document".<sup>2</sup>

The City asserts that it was unfairly surprised at the hearing by Klais's reliance on the *Handbook*. But Klais's written report cited the same factors as ones set forth in the *Handbook* (relatively low roadway traffic, daily train activity, and multiple crossings providing access to the same area) to support his conclusion that the crossings should be closed, although Klais's report did not couch his recommendations in the context of the federal *Handbook* as he did at the hearing. Klais's report did not identify the documents that he relied upon, but the prehearing order did not require that he do so.

Although the railroad characterized the factors listed in the *Handbook* as 'federal parameters' or 'federal criteria' for the closure of crossings, in fact it doesn't list just one set of criteria that should be used to evaluate crossing closure candidates, but instead includes varying criteria emanating from several different sources. Even more important, the *Handbook* offers the various criteria primarily to identify *candidates* for closure.

The *Handbook* doesn't say that crossings must or even should be closed simply because the stated criteria are met – and even if it did, the OCR isn't bound to follow it.

The *Handbook* states: "Specific criteria to identify crossings that should be closed are difficult to establish because of the numerous and various factors that should be considered. The *Traffic Control Devices Handbook* suggests criteria that may be used for crossing closure."<sup>3</sup> It is important that these criteria not be used without professional, objective, engineering, and economic assessment of the positive and negative impacts of crossing closures." (Footnote added; See, Section IV, Identification of Alternatives, E. Closure).

*Official Notice*. The City is also aggrieved that the hearing examiner not only overruled the City's objection to Klais's reliance on the *Handbook*, but also took 'administrative notice' of the *Handbook*.<sup>4</sup>

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<sup>1</sup> In its motion, the City refers to the document as an "FRA report". During his testimony, Klais correctly identified as a Federal Highway Administration publication.

<sup>2</sup> The *Handbook* is available on the FHWA's website. [http://safety.fhwa.dot.gov/xings/com\\_roaduser/07010/](http://safety.fhwa.dot.gov/xings/com_roaduser/07010/)

<sup>3</sup> The *Traffic Control Devices Handbook*. Washington, DC: Institute of Transportation Engineers, 2001. This is a private publication and should not be confused with the FHWA crossing handbook.

<sup>4</sup> The more correct terminology in Wisconsin administrative proceedings is 'official notice'. The term 'administrative

The City objects that it didn't have a fair opportunity to contest the validity of this 'official notice' citing §227.45 (3) Stats.

The City's objection overlooks the provision of the Wisconsin Administrative Procedure Act that allows giving notice *during the hearing*.<sup>5</sup> This requirement was satisfied by Klais's identification of the *Handbook* and the hearing examiner's statement that he was taking 'administrative notice' of that publication. OCR's procedural rules allow the parties to contest the validity of the evidentiary rulings after the hearing. The City could have offered countervailing manuals, handbooks, or other technical documents, but it didn't. Rather than availing itself of the opportunity allow by the OCR's rules, the City's post-hearing motion merely restates its objection that it didn't have adequate notice to contest the official notice.<sup>6</sup>

Taking official notice simply allows the OCR to use the *Handbook* to identify best or prevalent practices used to identify closure candidates, not to establish specific facts about this case. The 'fact' that other decision-makers have used these criteria may be of some aid to the OCR, but such use is more in the nature of a "legislative fact" than an "adjudicative fact".

The Judicial Council Committee's 1974 Note to §902.01 (Judicial Notice of Adjudicative Facts) includes this illuminating discussion of the distinction between "legislative facts" and adjudicative facts".

Sub. (1). Wisconsin acknowledges differing treatment for judicial notice of "adjudicative" and "legislative" facts.... It is important to note "legislative facts" deal not only with the content of law and policy but are also those "which help the tribunal ... to exercise its judgment and discretion in determining what course of action to take."

A human being is probably unable to consider a problem--whether of fact, law, policy, judgment, or discretion--without using his past experience, much of which may be factual and much highly disputable. ... Fact finding, law making, and policy formulation should be guided by experience and understanding, not limited to wooden judgments predicated upon the literal words of witnesses. ...

Judicial notice is not merely a substitute for formal proof by witnesses but is itself another method of proof of certain kinds of facts, namely, the method of research into the

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notice' means the same thing, but is terminology more commonly used by federal government agencies.

<sup>5</sup> §227.45 (3) An agency or hearing examiner may take official notice of any generally recognized fact or any established technical or scientific fact; but *parties shall be notified* either before or *during the hearing* or by full reference in preliminary reports or otherwise, of the facts so noticed, and they shall be afforded an opportunity to contest the validity of the official notice. (Emphasis added).

<sup>6</sup> In *City of Beloit by Beloit City School Bd. v. WERC*, 73 Wis.2d 43 (1976) 242 N.W.2d 231, 92 L.R.R.M. (BNA) 3318, 84 A.L.R.3d 221, 80 Lab.Cas. P 53,967, the Wisconsin Supreme Court concluded that "The employment relations commission has broad discretion as to what evidence it can consider. The applicable statute provides that: 'Agencies may take official notice...; but parties shall be notified either before or during hearing or by full reference in preliminary reports or otherwise, of the facts so noticed, and they shall be afforded an opportunity to contest the validity of the official notice.' With notice given as to admission of the articles and that they would be considered by the commission, we would find the 'notified during hearing' provisions of the statute here complied with."

professionally authoritative books and reports in the particular field. C. McCormick, Law of Evidence § 331 (1954).... As Davis says:

Of course, if “research into the professionally authoritative books and reports” is appropriate, its effectiveness will be destroyed if the research is limited to the indisputable or if the facts discovered are never mixed with uncertain judgment. ...

The *Handbook* is useful because it summarizes the practices and policies that have been adopted elsewhere, but not to establish particular facts.

It is hard to give much credence to the City’s claim of surprise, in a contested case hearing before the Office of the Commissioner of Railroads, when the railroad’s expert witness refers to a federal manual with the plain, but descriptive title, Railroad-Highway Grade Crossing Handbook. The *Handbook* has been described as a “document frequently used to assist in determining the need for certain traffic control devices...The *Handbook* draws on a number of different sources (including the MUTCD and the AASHTO *A Policy on Geometric Design of Highways and Streets* [Greenbook]) to provide an overview of highway-rail grade crossing legal and jurisdictional considerations.<sup>7</sup>

The City wasn’t unfairly disadvantaged by Klais’s use of the *Handbook* during his testimony or by the hearing examiner taking official notice of it.

Manuals, handbooks, and technical publications can provide useful guidance, but do not provide a substitute for a careful evaluation of the impacts of crossing closures based on the evidence in the record. None of these manuals or handbooks provides a decision matrix for the OCR. The decision whether to close particular crossings requires the exercise of human judgment and reasoned discretion.

Appearances:

**Parties**

Wisconsin & Southern Railroad Company  
by  
Brian Baird, Attorney  
Borgelt, Powell, Peterson & Frauen S.C.  
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Milwaukee, WI 53202

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<sup>7</sup> *Guidance on Traffic Control Devices at Highway-Rail Grade Crossings* (sometimes referred to as the “Technical Working Group Report”). <http://safety.fhwa.dot.gov/xings/collision/twgreport/#a71>

In Opposition:

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by  
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Madison Gas & Electric Co.  
by  
James C. Boll, Jr., Attorney (Substituted for Angela James, Attorney)  
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As Interest May Appear:

Wisconsin Department of Transportation  
by  
Mark Morrison, PE  
Grade Crossing Safety Engineer  
PO Box 7914  
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#### PROPOSED FINDINGS OF FACT

The Wisconsin & Southern Railroad Co. petitioned the Office of the Commissioner of Railroads for the closure of one or more of three public at-grade crossings of tracks. The WSOR operates on the tracks under an agreement with the Union Pacific Railroad Co. which owns the tracks.<sup>8</sup> The crossings are located on S. Brearly Street, S. Livingston Street, and S. Blount Street. Having considered all the evidence in the record, the **hearing examiner recommends** that the **S. Livingston Street crossing be closed**.

The railroad currently operates 8 to 10 total train movements per day over these crossings at a maximum timetable speed of 10 mph. Each crossing consists of one mainline track. Railroad witnesses testified that they expect to operate 12 to 15 trains per day at a maximum 20 mph possibly within 4 to 5 years. Train speeds have already been increased on other WSOR tracks in the Madison area. Freight hauled on this line has already increased (especially sand and grain). The increase has been absorbed so far by making up longer trains. Trains are now running 7,000' to 8,000' in length on this line. Madison is a crucial hub for the railroad with its major Johnson Street Yard only about a mile away from the East Isthmus Corridor

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<sup>8</sup> To remove any ambiguity: the state of Wisconsin does **not** own the line of track where the crossings are located. The state owns much of the trackage that the WSOR operates on, both in Madison and around the state, but it doesn't own this track.

and six of its lines converging here.

### **East Isthmus Corridor**

The three crossings that are the subject of the petition are located within a 0.38 mile stretch of tracks along a railroad line that extends through Madison's East Isthmus. Altogether there are eight at-grade roadway crossings within 1.06 track-miles or one crossing every 0.13 track-miles – from S. Blair Street at MP 138.46 to S. Dickinson Street at MP 139.52 (see Table for details). Each of these eight roadways is a two-way, two-lane street connecting Williamson Street to E. Washington Avenue.

**Transportation network.** The railroad tracks, Williamson Street, E. Main Street, and E. Washington Avenue run parallel to one another through the corridor. Traveling along any of the cross streets, it is about 1350' from Willy Street to East Wash (including 350' from East Wash to E. Main Street, 620' from E. Main Street to the tracks, and 380' from the tracks to Willy Street).

It is about 5300' from S. Blair Street to S. Dickinson Street, measured along either Willy Street or East Wash. The distance along the roadway is slightly less than the distance along the tracks because of the track curve that begins at the S. Ingersoll Street crossing while Willy Street and East Wash run in a straight line.

Taken together, Williamson Street, E. Main Street, and E. Washington Avenue along with the eight cross streets provide a transportation network that gives motorists multiple options to travel in any direction through, across, and within the corridor.

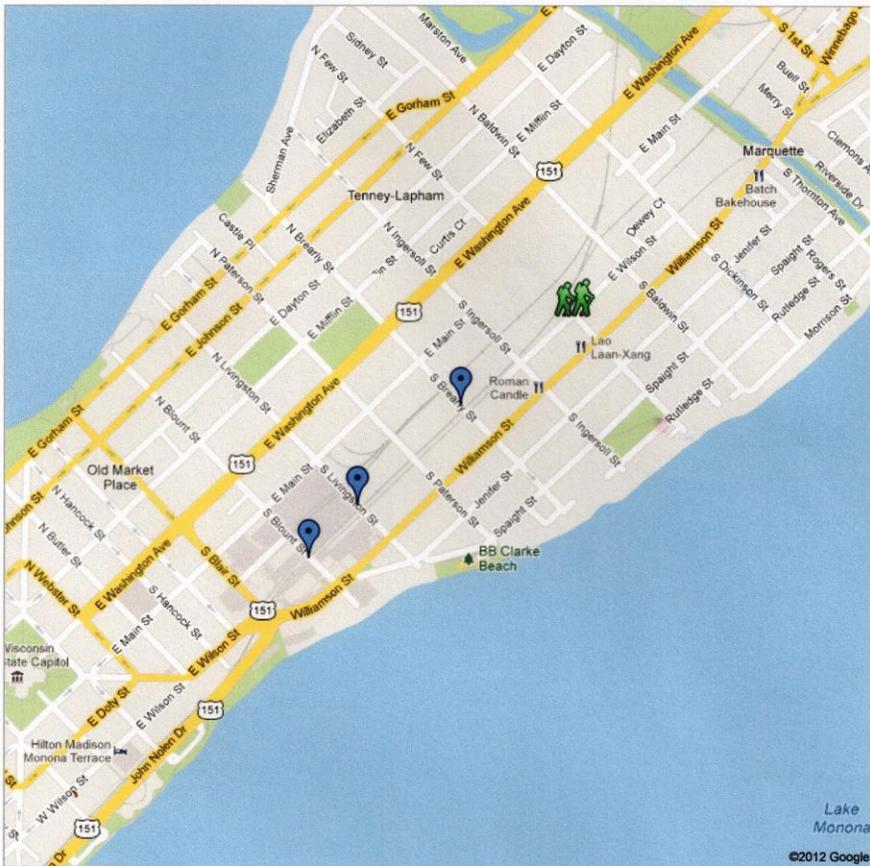
The availability of parallel connecting streets is a key point of analysis in determining whether a crossing is redundant, and thus can be closed without undue public convenience. Parallel connecting streets allow traffic that uses an existing crossing to conveniently divert to another route with little or no added travel distance if that crossing is closed. The East Isthmus corridor has a complete network of two-way streets laid out in a grid pattern, including paralleling streets about 400' away from the crossings in each direction.

While there are eight total crossings in the corridor, the most relevant roadways for purposes of evaluating the closures are the five crossings between S. Blount Street and S. Ingersoll Street (inclusive). The S. Baldwin Street and S. Dickinson Street crossings are too far distant to be reasonably treated as alternate routes for routine travel. S. Blair Street is close enough, but it isn't a comparable roadway to the local roads under consideration for closure.

After excluding those three streets, there are still five north-south streets (Ingersoll, Brearly, Paterson, Livingston, and Blount) that allow for travel in any direction over multiple routes. Each of these five roadways connects to the three east-west streets that parallel the tracks (East Wash, Willy Street, and E. Main Street). And of course, Ingersoll, Brearly, Paterson, Livingston, and Blount all cross the tracks within a half-mile stretch of track, a remarkably high number of crossings in such a short distance.

**Bicycle pathway.** The extraordinarily busy Capital City State Trail also parallels the tracks about 25'

south of the tracks.<sup>9</sup> During a special count taken by the City in 2009, there were actually substantially more bicycles on this pathway than there were motor vehicles on S. Brearly Street, S. Livingston Street, or S. Blount Street. Somewhat surprisingly, the data indicates that closing any of these crossings would have little impact on the use of the Capital City State Trail. That same special count showed that very few bicycles used the cross streets (for example, S. Livingston Street carried only 1.5% of the bicycle volume as did the pathway).



**Madison, WI**

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-  S. Blount Street  
 WSOR has proposed the closure of the road at the south track.
-  S. Livingston Street  
 WSOR has proposed the closure of the road at the south track.
-  S. Brearly Street  
 WSOR has proposed the closure of the road at the south track.
-  Few Street  
 City of Madison has proposed a new pedestrian/bicycle crossing of the south track by extending Few Street as a walkway beginning at E. Wilson Street. The walkway would provide access to Central Park.

<sup>9</sup> In one section from Dickinson Street to just past Ingersoll Street, the bicycle route shares E. Wilson Street with motorized uses.

Roadway	RR Milepost	2004 Road Traffic Volume <sup>10</sup>	2009 Road Traffic Volume <sup>11</sup>	Warning devices	Controls at E. Wash	Access to E. Wash	Controls at Willy Street	Controls at E. Main
S. Blair	138.46	39,350	25,650	Gates	Traffic lights	Full	Traffic lights	Stop signs
S. Blount	138.60	2250	1700	Signals only	Stop signs	Full	Stop signs <sup>12</sup>	Stop signs
S. Livingston	138.73	850	1050	Signals only	Stop signs	Right-in, right-out	Stop signs	Stop signs
S. Paterson	138.88	2900	2350	Signals only	Traffic lights	Full	Traffic lights	4-way stop signs
S. Brearly	138.98	1250	1100	Signals only	Stop signs	Right-in, right-out <sup>13</sup>	Stop signs	Stop signs
S. Ingersoll	139.10	3400	2900	Signals only	Traffic lights	Full	Traffic lights	Stop signs
S. Baldwin	139.36	4800	3900	Gates	Traffic lights	Full	Traffic lights	DNA
S. Dickinson	139.52	2250	1450	Signals only	Stop signs	Full	Stop signs	DNA
<b>Total Track miles</b>	<b>1.06 miles</b>							

**Physical characteristics of the crossings.** Each of the three subject roadways consists of two traffic lanes, have 25 mph speed limits, cross the tracks at a 90° angle, have adequate approach and clearing sight distances, and inadequate corner sight distance.

*Approach sight distance.* The necessary approach sight distance equals the safe stopping distance based on the speed limit. If a driver can see the crossing warning devices from the safe stopping distance, then approach sight distance is adequate. A driver traveling at 25 mph needs a distance of 187' to stop safely. The crossing warning devices are visible at each crossing from more than 187' in each direction.

*Corner sight distance.* Assuming a train speed of 20 mph, a driver traveling at 25 mph needs to see a

<sup>10</sup> The traffic volumes provided in this column are 2004 traffic counts taken from the FRA crossing inventory reports.

<sup>11</sup> The traffic volumes provided in this column are 2009 traffic counts submitted by the City.

<sup>12</sup> There are offset traffic lights at Jennifer Street, about 125' east of S. Blount/Willy Street.

<sup>13</sup> Inbound traffic on E. Washington may also turn left onto at S. Brearly.

train when it is 210' from the crossing from a point 187' down the highway. One or more quadrants is obstructed by a building at each of the three crossings. Thus, the corner sight distance is inadequate at each crossing.

*Clearing sight distance.* At all crossings, except those with gates, a driver stopped 15' short of the near rail must be able to see far enough down the track, in both directions, to determine if sufficient time exists for moving their vehicle safely across the tracks to a point 15' past the far rail, prior to the arrival of a train. Required clearing sight distance along both directions of the track, from the stopped position of the vehicle, is dependent upon the maximum train speed and the acceleration characteristics of the "design" vehicle. The necessary clearing sight distance at each of the crossings is 450'. The available clearing sight distance is adequate in all quadrants at each crossing.

*Crash history.* Two train-vehicle accidents have occurred at the S. Brearly Street crossing since 1973 (in 1973 and 1977). Two train-vehicle accidents have also occurred at the S. Blount Street crossing since 1973 (in 1976 and 1978). No train-vehicle accidents have occurred at the S. Livingston Street crossing since 1973.

***Net benefit of installing automatic flashing lights with gates.*** The Wisconsin Department of Transportation has produced a benefit-cost analysis for all at-grade crossings in the state. All three of the subject crossings have a negative net benefit for installing new automatic flashing lights and gates (i.e. the costs of upgrading the warning devices exceeds the safety benefit).

Installing new automatic flashing lights with gates and constant warning time circuitry at the **S. Brearly Street** crossing has a net benefit of about \$(187,700). The benefit-cost ratio is about 0.16 meaning that the public would receive \$0.16 in safety benefits for each dollar expended to install the lights and gates. The net benefit at the **S. Blount Street** crossing is \$(177,600) with a benefit-cost ratio \$0.20 in safety benefits for each dollar expended. The net benefit at the **S. Livingston Street** crossing is \$(193,100) with a benefit-cost ratio \$0.14 in safety benefits for each dollar expended.

***Current warning devices.*** The S. Blount Street crossing presently has mast-mounted 12" automatic flashing lights for warning devices. The S. Brearly Street crossing presently has mast-mounted 12" automatic flashing lights for warning devices. The existing warning devices adequately protect public safety at the S. Blount Street and S. Brearly Street crossings<sup>14</sup>.

### ***Discussion of the Recommendation to Close S. Livingston Street***

The railroad's petition to close one or more of the crossings in the East Isthmus corridor has proven challenging to resolve. On the one hand, none of the three crossings is especially dangerous, whether measured by a net benefit analysis, by crash history, by their physical characteristics, or by the number and speed of trains. On the other hand, there are simply more crossings than can be justified by public

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<sup>14</sup> This conclusion doesn't contradict the City's plan to fund upgrades for the purpose of establishing a federal quiet zone through this corridor. Instead, it simply indicates that the public safety benefits to motorists from that upgrade are inadequate to justify use of the limited state and federal crossing safety funds.

necessity and convenience.

The crossing density in the corridor is very high with one crossing every 0.13 track miles from S. Blair Street to S. Dickinson Street and one crossing every 0.10 track miles from S. Blount Street to S. Ingersoll Street.

The crossings within the East Isthmus corridor fall within the criteria identified in the *Handbook*, to wit, more than four crossings per mile (in fact, there five crossings in just a half-mile), three crossings with fewer than 2,000 vehicles per day, and more than two trains per day.

Ample adequate alternate routes to the crossings S. Livingston Street exist. As previously noted, the availability of parallel connecting streets is a key factor in determining whether a crossing can be closed without unacceptable public inconvenience. S. Livingston Street intersects with Willy Street and E. Main Street less than 400' from the crossing. Those streets allow motorists to travel to an alternate crossing in either direction with virtually no added travel. The crossings at S. Paterson and S. Blount, 650' to the east and west respectively, will remain open.

The continued existence of so many crossings in such a short distance, when reasonably adequate alternate routes are available, unreasonably imposes ongoing costs on the railroad. Railroads bear a statutory duty to maintain at-grade crossings in suitable condition for public travel at their own cost (see §86.12). Railroads also pay at least 50% of the cost to maintain crossing warning devices (labor and materials). The railroad should not have to continue to bear these not insubstantial costs unless the crossings are necessary for public convenience.

The **hearing examiner** concludes that one of three crossings should be closed because the crossings aren't all needed for public convenience. Of these crossings, S. Livingston Street is the most reasonable choice for closure. The City's previous actions indicate that it also views S. Livingston Street as the least important of the five north-south roadways in the corridor (with S. Brearly Street a close second). S. Livingston Street has the most restricted access to East Washington Avenue with only right-in, right-out movements being allowed. It is controlled by 2-way stop signs not only at East Wash and Willy Street, but also at E. Main Street.

Closure of S. Livingston Street will create a dead-end roadway on each side of the tracks. The City argued that closing any one of these crossings would create traffic congestion and decrease safety by diverting drivers who now make left turns from Williamson Street at S. Livingston Street to the signalized intersection at S. Paterson Street. There are 45 traffic cycles per hour at the Paterson Street intersection. According to the City, adding even a few left-turning vehicles per hour will exceed the capacity of the intersection for left turns with the result that left-turning vehicles will have to sit through another signal cycle. Such waiting vehicles would be blocking the left lane of Williamson Street because when the City rebuilt Williamson Street in 2011, it did not add separate left turn bays.

Madison Metro Transit does not run *any* regularly scheduled bus routes over S. Livingston Street.

The City argued that closure of any of the crossings would negatively impact prospects for redevelopment along any street that was closed. The City especially emphasized the need for continued "convenient

connectivity” and “ready access” between Willy Street and East Wash. The closure of the Livingston Street crossing, a roadway that carries less than 1000 vehicles per day, will not materially impair the desired connectivity or access given the other streets and crossings that will remain open.

Traffic that currently uses S. Livingston Street will divert to other routes and all, or very nearly all of the traffic will still have to cross the tracks. It was suggested by the City that public safety will, therefore, not be improved by the closure. In fact, the diversion will improve public safety by concentrating traffic at fewer crossings and thereby increase the likelihood that a vehicle queue will occur at the crossing when the crossing signals are activated by the approach of a train. This queue will deter other drivers from bypassing the crossing warning devices. This queuing effect seems like a small thing until one considers that it only happens when a train is approaching the crossing.

The S. Livingston Street crossing presently has mast-mounted 12” automatic flashing lights for warning devices. The existing warning devices adequately protect public safety, but the **hearing examiner** finds that the S. Livingston Street crossing is redundant. The remaining crossings between S. Blair Street and S. Baldwin Street will provide reasonably adequate access for area residents and businesses as well as traffic circulation in the overall corridor, including the interchange of traffic between E. Washington Avenue and Williamson Street.

Closing the S. Livingston Street crossing will improve public safety by eliminating a conflict point between trains and roadway vehicles. The crossing is not necessary for public convenience. Given the availability of alternate routes, S. Livingston Street is a redundant crossing. Eliminating a redundant crossing serves the public interest.<sup>15</sup>

The **hearing examiner** recognizes the strongly held views of those opposing the closure of this or any crossing in the corridor. Deciding whether to **recommend** the closure of any of the crossings was challenging because while there are more crossings than necessary, the crossings are also not especially dangerous by any demonstrable measure. Closures of roadways also tend to impose higher costs on some users of the roadway than others. People who use S. Livingston Street simply to reach Willy Street or East Wash will suffer virtually no loss of mobility. People who live, work, or own businesses on the dead-ended sections of the roadway will bear the unavoidable inconvenience occasioned by being on a dead-end road. On balance, the **hearing examiner** finds that the closure is warranted, but that the decision was a close one.

It was an equally close call whether to recommend the closure of the S. Livingston or S. Brearly crossing.<sup>16</sup> They are, in many respects, nearly identical streets in terms of traffic volume, access to East Wash and Willy Street, and traffic controls. In the end, the **hearing examiner** decided to **recommend** the closure of S. Livingston rather than S. Brearly because of the latter’s slightly higher traffic volume and because it will probably be easier to construct the necessary cul de sacs at S. Livingston than at S.

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<sup>15</sup> The closure will also reduce the City’s outlay needed to establish a federal quiet zone by eliminating the need to pay for new lights and gates at this crossing.

<sup>16</sup> Closing *both* S. Livingston *and* S. Brearly wasn’t a close call, however, because closing two of the crossings in the East Isthmus corridor would have too many negative impacts on traffic circulation, traffic flow, and prospects for economic development . Nor was whether to recommend closing the S. Blount Street crossing a close call, primarily because of the negative impacts on MG&E’s main campus for its customers, visitors, and employees.

Brearily.

## **End-of-Road Treatment and Apportionment of Costs**

The **hearing examiner recommends** that the Commissioner grant the petition of the Wisconsin & Southern Railroad Co. to close the S. Livingston Street crossing. The **proposed** order requires the City to construct and maintain a cul de sac on each approach. The cul de sac design shall be consistent with AASHTO's, *A Policy on Geometric Design of Highways and Streets*, 6<sup>th</sup> edition, 2011. Cul de sacs are needed in order to allow fire trucks, municipal waste trucks, and other large vehicles (including MG&E trucks on the north side of the crossing) to be able to safely turn around. The crossing cannot be safely closed until the cul de sacs are constructed.

The City shall also install and maintain barricades, end-of-roadway signage and markers on each approach, along with appropriate advance warning signs. End-of-roadway signs are described in the MUTCD (See, Section 2C.66, Object Markers for Ends of Roadway and Figure 2C-13, Type 4 Object Markers (end-of-roadway)).

## **Costs**

The OCR's past practice has always apportioned the vast majority of the costs to implement a crossing closure to the railroad. The OCR has used two approaches. The first method splits the costs by percentage. When using this method, the OCR has always assigned 90% of the cost to the railroad and 10% to the road authority. The second method assigns the entire costs of particular tasks to one party or the other (e.g., the railroad pays 100% of cul de sac construction cost to the railroad and the road authority pays 100% for the end-road barricades and signage).

Under either method, the OCR has traditionally relied on the parties to sort out the bills without regulatory oversight. The first method is theoretically more precise, but the parties complained it was complicated to employ in practice. The second method is less precise, but far easier for the parties to use. Generally speaking, the railroad pays 90% and the road authority 10% under either approach.

The OCR has used the second method more often in recent years, but a problem has developed when the party assigned to perform a task isn't the party that has to pay for it because the party doing it has little incentive to hold down costs. This problem has been most noticeable with regard to construction of vehicular turnarounds with railroads complaining about what they perceived as excessive costs.

To avoid this problem, the **proposed** order splits all of the costs to close the crossing and assigns 90% to the railroad and 10% to the City. To improve the OCR's oversight of the costs, the **proposed** order requires the City of Madison to prepare and submit design plans and cost estimates (including real estate costs) for the construction of the cul de sacs and for the installation of barricades, markers, and signage and the Wisconsin & Southern Railroad Co. to submit cost estimates for the removal of the crossing surface and roadway within the railroad right-of-way.

## PROPOSED ULTIMATE CONCLUSIONS ON THE ISSUES

1. That the closure of the crossing at-grade of the tracks owned by the Union Pacific Railroad Co. and operated by the Wisconsin & Southern Railroad Co. with S. Livingston Street in the City of Madison, Dane County will promote public safety and convenience.
2. That the closure of the crossing at-grade of the tracks owned by the Union Pacific Railroad Co. and operated by the Wisconsin & Southern Railroad Co. with S. Brearly Street in the City of Madison, Dane County would not promote public safety and convenience.
3. That the closure of the crossing at-grade of the tracks owned by the Union Pacific Railroad Co. and operated by the Wisconsin & Southern Railroad Co. with S. Blount Street in the City of Madison, Dane County would not promote public safety and convenience.
4. That the existing warning devices at the S. Brearly Street and S. Blount Street crossings adequately protect and promote public safety.
5. That it is reasonable for the Wisconsin & Southern Railroad Co. pay 90% and the City of Madison 10% of the cost to close the S. Livingston Street crossing, including the construction of the vehicle turnarounds, real estate acquisition, removal of the crossing and the roadway approaches within the railroad right-of-way, and barricades, signage, and markers required to mark the end-of-road.

## PROPOSED CONCLUSION OF LAW

That the jurisdiction of the Office of the Commissioner of Railroads under §§195.28 and 195.29, Stats., extends to this matter. Accordingly, the Office enters an order consistent with the findings of fact.

## PROPOSED ORDER

**The hearing examiner recommends that the Commissioner adopt the following order:**

1. That the petition of the **Wisconsin & Southern Railroad Co.** for the closure of crossing at-grade of **S. Livingston Street** with the tracks owned by the Union Pacific Railroad Co. and operated by the Wisconsin & Southern Railroad Co. in the City of Madison, Dane County is **hereby granted** (crossing no. 177 827L / MP 138.73).

2. That the **City of Madison** shall prepare and submit preliminary design plans with cost estimates (including real estate costs) for the closure of the **S. Livingston Street** crossing, including the construction cost for each cul de sac and the necessary barricades, markers, and signage (see paragraph 5, below) to the Office of the Commissioner of Railroads and the Wisconsin & Southern Railroad Co. by **September 30, 2012** (crossing no. 177 827L / MP 138.73). The plans shall be consistent with AASHTO's *A Policy on Geometric Design of Highways and Streets*, 6<sup>th</sup> edition, 2011 or other generally accepted engineering practices.

3. That the **Wisconsin & Southern Railroad Co.** shall prepare and submit cost estimates for the removal of the crossing surface and roadway within the railroad right-of-way by **September 30, 2012**.

4. That the **City of Madison** shall install and maintain a cul de sac on each approach to the **S. Livingston Street** crossing consistent with AASHTO's *A Policy on Geometric Design of Highways and Streets*, 6<sup>th</sup> edition, 2011 in the City of Madison, Dane County **no later than June 1, 2013** (crossing no. 177 827L / MP 138.73).

5. That the **Wisconsin & Southern Railroad Co.** shall remove the crossing surface and obliterate the roadway approaches within the railroad right-of-way for the crossing at-grade of **S. Livingston Street** with the tracks owned by the Union Pacific Railroad Co. and operated by the Wisconsin & Southern Railroad Co. in the City of Madison, Dane County **after June 1 and before June 15, 2013** (crossing no. 177 827L / MP 138.73).

6. That the **City of Madison** shall install and maintain the following barricades, signs and markers on each approach to the **S. Livingston Street** crossing at-grade by **May 15, 2013**:

- a) Advance Road Closed warning sign;
- b) ROAD CLOSED sign (R11-2 in the MUTCD),
- c) Type 3 barricade (2B-67) with reflective red and white stripes;
- d) At least three end-of-roadway markers (Figure 2C-13, Type 4 Object Markers).

7. That the **Wisconsin & Southern Railroad Co.** shall not remove the **S. Livingston Street** crossing surface or roadway approaches within the railroad right-of-way until barricades, signs and markers required in paragraph 5, above, have been installed.

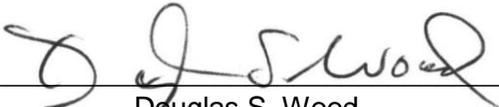
8. That the petition of the **Wisconsin & Southern Railroad Co.** for the closure of crossings at-grade of **S. Brearly Street** (crossing no. 177 831B / MP 138.98) and **S. Blount Street** (177 823J / MP 138.60) with the tracks owned by the Union Pacific Railroad Co. and operated by the Wisconsin & Southern Railroad Co. in the City of Madison, Dane County is **hereby denied**.

9. That the **Wisconsin & Southern Railroad Co.** shall pay 90% and the **City of Madison** 10% of the costs to close the **S. Livingston Street**, including the costs to construct vehicle turnarounds, acquire real estate, remove the crossing surface, remove the roadway approaches within the railroad right-of-way, and install barricades, signage, and markers. The **Wisconsin & Southern Railroad Co.** shall also bear any cost assessed to the railroad pursuant to §195.60, Stats., for the investigation of this matter by the Office. The railroad shall not pass on those assessment costs either directly or indirectly.

10. That jurisdiction is retained.

Dated at Madison, Wisconsin, July 13, 2012.

By the Office of the Commissioner of Railroads.

  
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Douglas S. Wood  
Hearing Examiner

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