

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

FINAL 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 S. Brearly Street (crossing no. 177 831B / MP 138.98), S. Livingston Street (177 827L / MP 138.73), and S. Blount Street (177 823J / MP 138.60) in the City of Madison, Dane County.

The hearing in this matter was scheduled and postponed twice before the matter was heard. A hearing scheduled on June 29-30, 2010 was indefinitely postponed when the location of a proposed passenger station was changed in May 2010 from the Dane County Regional Airport to Monona Terrace. The change in location of the passenger station required substantial changes in track design through the East Isthmus corridor. The Madison portion of the high-speed passenger project was subsequently cancelled. A hearing scheduled to be held on September 27-28, 2011 was postponed 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.

On July 13, 2012, the hearing examiner issued a proposed decision that recommended granting railroad's petition to close the S. Livingston Street crossing and denying the petition to close S. Brearly Street and S. Blount Street crossings.

By letter dated July 26, 2012, the City of Madison and Madison Gas & Electric (MG&E) separately submitted comments opposing the proposed decision with respect to the closure of the S. Livingston Street crossing and supporting it with respect to keeping the S. Brearly Street and S. Blount Street crossings open.

By letter dated July 27, 2012, Alder Marsha Rummel submitted comments. Alder Rummel also opposes the proposed decision with respect to the closure of the S. Livingston Street crossing and supports it with respect to keeping the S. Brearly Street and S. Blount Street crossings open. Alder Rummel also submitted an email dated September 3, 2012, requesting that bike and pedestrian crossings be retained if the S. Livingston Street crossing is ordered to be closed.

By letter dated July 27, 2012, State Rep. Chris Taylor submitted comments also opposing the proposed decision with respect to the closure of the S. Livingston Street crossing and supporting it with respect to keeping the S. Brearly Street and S. Blount Street crossings open.

The OCR also received comments on the proposed decision from members of the public with a majority opposing the closure of the S. Livingston Street crossing.

The Commissioner has reviewed and carefully considered all the comments submitted by the (City of Madison and MG&E), elected officials, and the general public. The Commissioner finds the objections to the proposed decision's recommendation to close the S. Livingston Street crossing unpersuasive.

Alternatively, the City requested additional time to implement the crossing changes in the event that the Commissioner decided to order one or more crossing closures. Specifically, the City requested that the deadlines be extended by one year to allow adequate time for surveying (surveying contracts for 2013 projects have already been awarded), real estate acquisition, and possible changes to the Williamson Street traffic signals. The Commissioner grants the City's request to extend the deadlines.

The Commissioner agrees with the hearing examiner's recommendations to close the S. Livingston Street crossing and leave the S. Blount Street crossing open, but, unlike the hearing examiner, the Commissioner concludes that the S. Brearly Street crossing should also be closed.

This case boils down to how many crossings are necessary to provide adequate roadway routes within the area, connections to adjoining areas and access to the nearby major transportation facilities. This determination is necessarily calls for exercising reasoned discretion. There isn't a precise formula that yields the one right answer. The hearing examiner concluded that closing one crossing was reasonable, but closing two crossings (S. Livingston and S. Brearly) "would have too many negative impacts on traffic circulation, traffic flow, and prospects for economic development." The Commissioner respectfully disagrees.

As the hearing examiner noted, S. Livingston and S. Brearly Streets are very similar. They carry the lowest volume of traffic of any of the eight north-south roadways in the East Isthmus corridor. They both have limited access to East Washington Avenue reflecting the City's own conclusion when East Washington Avenue was rebuilt that these are the two least significant roadways in the corridor. Both streets have stop conditions at E. Main Street, Williamson Street and East Washington Avenue, while traffic on those east-west streets does not have to stop for traffic on S. Livingston or S. Brearly. Traffic entering East Washington Avenue from either street is limited to making a right turn. The only differences are minor. Traffic on East Washington Avenue can only make a right turn onto S. Livingston, while traffic moving in either direction on East Washington Avenue can turn onto S. Brearly. Second, traffic volume is heavier on S. Brearly than S. Livingston, but not much (see the table below on page 9).

Closing both the S. Livingston and S. Brearly crossings will still leave multiple ways for traffic to move in any direction, whether east-west on E. Main Street, Williamson Street or East Washington Avenue or north-south on S. Blount, S. Paterson, and S. Ingersoll Streets. The closings will not reduce the number of traffic signal-controlled intersections at East Washington Avenue or Williamson Street. The

Commissioner simply doesn't agree that closing two crossings on streets that already have limited access to *the* major transportation facility in the East Isthmus corridor will materially hamper economic development. Opponents to closing any crossings in the corridor have asked why these crossings should be closed. A better question is why these crossings should remain open. There are currently eight crossings in a 1.06 mile corridor. The recent approval of the Few Street pathway crossing brings that number to 9. Closing the S. Livingston Street and S. Brearly Street crossings will result in a net reduction of one crossing. Six roadway crossings will still remain within 1.06 miles (seven total crossings counting Few Street), which allows ample opportunity for roadway, bike, and pedestrian movement in the neighborhood. Given the abundant alternate routes provided by the street grid in the corridor, there simply isn't a good reason to keep either crossing open. Thus, the Commissioner concludes that the S. Brearly Street crossing should be closed in addition to the S. Livingston Street crossing.

For further discussion of this decision to close both crossings and the reasons the Commissioner views the case differently from the hearing examiner, see the section headed *Discussion of the Order to Close S. Livingston Street and S. Brearly Street* beginning on page 10.

**Post-hearing motions.** Subsequent to the hearing, the City of Madison filed two evidentiary motions. The City did not renew its objections in its comments on the proposed decision, as allowed by the OCR's administrative rules. See, Wis. Admin. Code §RR 1.06 (4). The Commissioner adopts the hearing examiner's post-hearing rulings as set forth in the proposed decision. Rather than restating the rulings in their entirety, the Commissioner incorporates the rulings by reference as if fully set forth in this final decision.

The Commissioner does, however, restate part of the ruling denying the City's motion to partially exclude testimony of the railroad's expert witness because of its useful discussion of certain federal manuals and how the guidance they contain should be used in selecting candidates for closure. The Commissioner also restates part of ruling on *Official Notice* because of its discussion of important adjudicative principles.

The railroad's expert, buttressed his testimony in support of the crossing closures by relying on criteria set forth in a federal government manual, 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 expert'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 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

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<sup>1</sup> In its motion, the City refers to the document as an "FRA report". During his testimony, the railroad's expert, Al Klais correctly identified as a Federal Highway Administration (FHWA) 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/)

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 hearing examiner took ‘administrative notice’ of the *Handbook*.<sup>4</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 in reaching a decision, 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”.

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

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

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.

The *Railroad-Highway Grade Crossing 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<sup>5</sup> 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>6</sup>

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  
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In Opposition:

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by  
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<sup>5</sup> MUTCD stands for Manual on Uniform Traffic Control Devices.

<sup>6</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>

Madison Gas & Electric Co.  
by  
James C. Boll, Jr., Attorney (Substituted for Angela James, Attorney)  
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Madison, WI 53701-1231

As Interest May Appear:

Wisconsin Department of Transportation  
by  
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Grade Crossing Safety Engineer  
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#### Findings of Fact

#### THE COMMISSIONER FINDS:

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>7</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 Commissioner orders that the S. Livingston Street and the S. Brearly Street crossings 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 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

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<sup>7</sup> To remove any uncertainty: 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.

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 Williamson Street to East Washington Avenue (including 350' from East Washington Avenue to E. Main Street, 620' from E. Main Street to the tracks, and 380' from the tracks to Williamson Street).

It is about 5300' from S. Blair Street to S. Dickinson Street, measured along either Williamson Street or East Washington Avenue. 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 Williamson Street and East Washington Avenue 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.

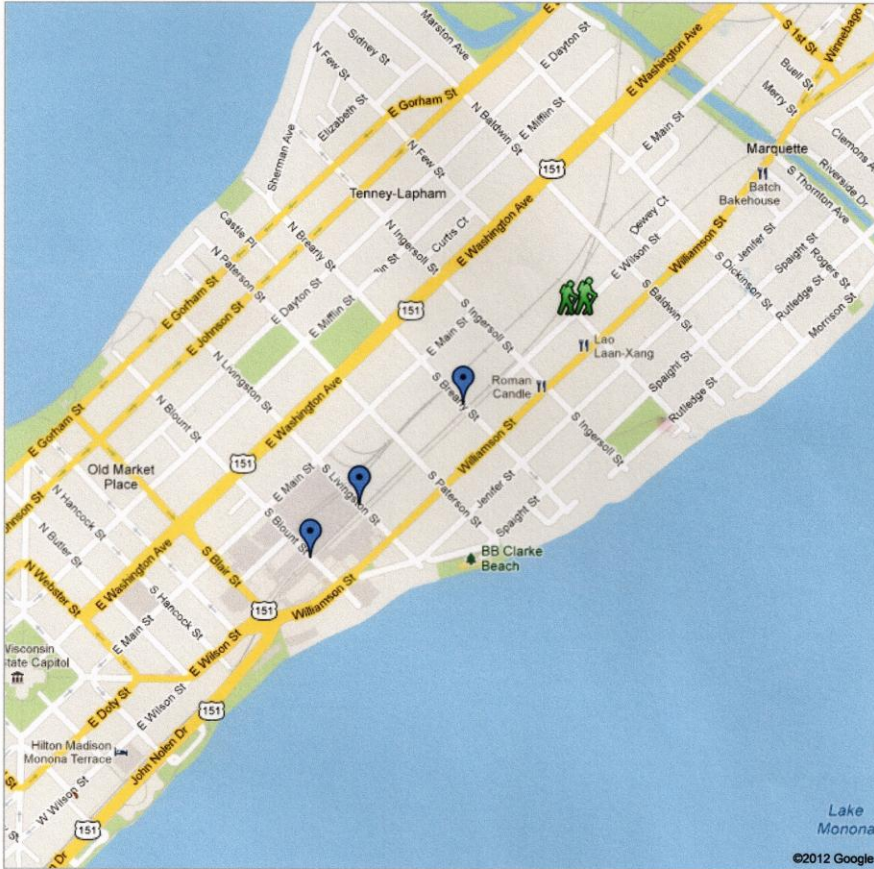
After excluding those three streets, there are still five north-south streets (Ingersoll, Brearly, Paterson, Livingston, and Blount) that allow for travel in any direction over multiple routes. Each of these five roadways connects to the three east-west streets that parallel the tracks (East Washington Avenue, Williamson 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>8</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

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<sup>8</sup> In one section from Dickinson Street to just past Ingersoll Street, the bicycle route shares E. Wilson Street with motorized uses.

have little impact on the use of the Capital City State Trail. According to that special count showed that very few bicycles used the cross streets. For example, S. Livingston Street carried only 1.5% as much bicycle traffic as the pathway carries. S. Brearly Street carries even less bicycle traffic than S. Livingston Street.



**Madison, WI**

Public · 1 views  
 Created on Feb 16 · By doug · Updated Feb 22

-  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.



| Roadway                  | RR Milepost       | 2004 Road Traffic Volume <sup>9</sup> | 2009 Road Traffic Volume <sup>10</sup> | Warning devices | Controls at E. Wash | Access to E. Wash                 | Controls at Williams on 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>11</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>12</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.

<sup>9</sup> The traffic volumes provided in this column are 2004 traffic counts taken from the FRA crossing inventory reports.

<sup>10</sup> The traffic volumes provided in this column are 2009 traffic counts submitted by the City.

<sup>11</sup> There are offset traffic lights at Jennifer Street, about 125' east of S. Blount/Williamson Street.

<sup>12</sup> Inbound traffic on E. Washington may also turn left onto at S. Brearly.

*Corner sight distance.* Assuming a train speed of 20 mph, a driver traveling at 25 mph needs to see a 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.*** Each of the three crossings in question has mast-mounted 12" automatic flashing lights for warning devices. The existing warning devices adequately protect public safety at the S. Blount Street crossing<sup>13</sup>.

### ***Discussion of the Order to Close S. Livingston Street and S. Brearly 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>13</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 lack of need for the S. Livingston Street and S. Brearly Street, in light of the abundant alternate routes, means the crossings are redundant and should be closed.

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 exist for both the S. Livingston Street and S. Brearly Street crossings. 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 and S. Brearly Street each intersect with Williamson Street and E. Main Street less than 400' from their respective crossings. Those streets allow motorists to travel to an alternate crossing in either direction with virtually no added travel. Even after the S. Livingston Street and S. Brearly Street crossing closures, three nearby alternate crossings will remain open just 650' away in both directions (S. Paterson and S. Blount Streets for S. Livingston Street and S. Ingersoll and S. Paterson Streets for S. Brearly Street). All three of these alternate routes connect Williamson Street to East Washington Avenue and have full access to those streets. Two of three alternate routes (S. Ingersoll and S. Paterson) access both East Washington Avenue and Williamson Street at traffic signal-controlled intersections.

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 Commissioner concludes that two of three crossings (S. Livingston and S. Brearly) proposed by the railroad should be closed because the crossings aren't needed for public convenience. The City's previous actions indicate that it also views S. Livingston Street and S. Brearly Street as significantly less important than the other three north-south roadways in the corridor. S. Livingston Street and S. Brearly Street carry the least traffic and have the most restricted accesses to East Washington Avenue. These are the only two streets in the corridor between S. Blair and S. Dickinson that do not have access across East Washington Avenue. Traffic on East Washington Avenue, Williamson Street, and E. Main Street doesn't have to stop for traffic on either S. Livingston or S. Brearly.

Closure of the S. Livingston Street and S. Brearly Street crossings will create dead-end roadways 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, a decision that presumably reflects a belief that the roadway had sufficient capacity to absorb more traffic from the economic development that the City expects to occur in the area.

Madison Metro Transit does not run *any* regularly scheduled bus routes over either S. Livingston Street or S. Brearly 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 Williamson Street and East Washington Avenue. The closure of the S. Livingston Street and S. Brearly Street crossings, roadways that each carried about 1100 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 and S. Brearly 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 existing warning devices adequately protect public safety, but the Commissioner finds that the S. Livingston Street and the S. Brearly Street crossings are 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 and S. Brearly Street crossings will improve public safety by eliminating a conflict point between trains and roadway vehicles. The crossings are not necessary for public convenience. Given the availability of alternate routes, S. Livingston Street and S. Brearly Street are redundant crossings. Eliminating redundant crossings serves the public interest.<sup>14</sup>

The Commissioner respects those who oppose closing any crossing in the corridor. However, as noted at the outset, the Commissioner views the question differently than the hearing examiner. When the Commissioner asks why the crossings should remain open, with respect to the S. Livingston Street and S. Brearly Street crossings, the evidence in the record doesn’t support keeping either one open. To the contrary, the evidence in the record demonstrates that neither crossing is needed and therefore, should be closed. Unlike the hearing examiner, the Commissioner doesn’t see this decision as a particularly close call.

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<sup>14</sup> The closures 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 these crossings.

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

The Commissioner grants the petition of the Wisconsin & Southern Railroad Co. to close the S. Livingston Street and S. Brearly Street crossings. This final 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. Neither crossing can 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 been to apportion 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. In that situation, the party doing the work 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 order splits all of the costs to close the crossings and assigns 90% to the railroad and 10% to the City. To improve the OCR's oversight of the costs, the 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 surfaces and roadways within the railroad right-of-way.

## Ultimate Conclusions on the Issues

### THE COMMISSIONER CONCLUDES:

1. That the closure of the crossings at-grade of the tracks owned by the Union Pacific Railroad Co. and operated by the Wisconsin & Southern Railroad Co. with S. Livingston Street and S. Brearly 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. Blount Street in the City of Madison, Dane County would not promote public safety and convenience.
3. That the existing warning devices at the S. Blount Street crossings adequately protect and promote public safety.
4. 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 and S. Brearly Street crossings, 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.

### Conclusion Of Law

### THE COMMISSIONER CONCLUDES:

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.

### Order

### THE COMMISSIONER ORDERS:

1. That the petition of the **Wisconsin & Southern Railroad Co.** for the closure of the crossings at-grade of **S. Livingston Street** and **S. Brearly 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** and **S. Brearly Street** crossings, 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, 2013** (S. Livingston Street crossing no. 177 827L / MP 138.73 and S. Brearly Street crossing no. 177 831B / MP 138.98). 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 **June 1, 2014**.

4. That the **City of Madison** shall install and maintain a cul de sac on each approach to the **S. Livingston Street** and **S. Brearly Street** crossings 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, 2014** (S. Livingston Street crossing no. 177 827L / MP 138.73 and S. Brearly Street crossing no. 177 831B / MP 138.98).

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 crossings at-grade of **S. Livingston Street** and **S. Brearly 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, 2014** (S. Livingston Street crossing no. 177 827L / MP 138.73 and S. Brearly Street crossing no. 177 831B / MP 138.98).

6. That the **City of Madison** shall install and maintain the following barricades, signs and markers on each approach to the **S. Livingston Street** and **S. Brearly Street** crossings at-grade by **May 15, 2014**:

- 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 crossing surface or roadway approaches within the railroad right-of-way at either the **S. Livingston Street** or **S. Brearly Street** crossing until the 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 crossing at-grade of **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** and **S. Brearly 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, September 12, 2012.

By the Office of the Commissioner of Railroads.

/s/Jeffrey T. Plale  
Jeffrey T. Plale  
Commissioner of Railroads

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