

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**BNSF Railway Company**  
**Review of Private RR Crossings**  
**Application**

**Case No. RR-10-26**

**AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

**John Hamre** deposes and says that:

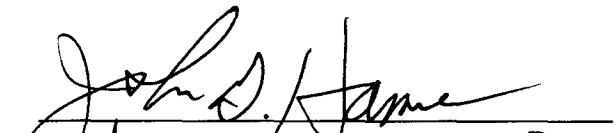

he is over the age of 18 years and not a party to this action and, on the **18th** day of **May, 2010**, he electronically mailed to 1 recipient a copy of the following:

**Findings of Fact, Conclusions of Law, and Order**

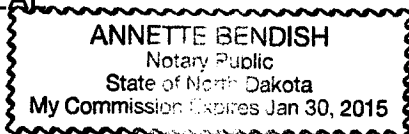
The document was sent to the following recipient using the email address as shown:

Stephen W. Plambeck  
Nilles Law Firm  
PO Box 2626  
Fargo, ND 58108-2626  
splambeck@nilleslaw.com

Subscribed and sworn to before me  
this **18th** day of **May, 2010**

  
  
Notary Public

SEAL



**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**BNSF Railway Company**  
**Review of Private Railroad Crossing**  
**Application**

**Case No. RR-10-26**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

**May 18, 2010**

**Appearances**

Commissioners Kevin Cramer, Tony Clark, and Brian P. Kalk.

Stephen W. Plambeck, Attorney, Nilles Law Firm, 201 North Fifth Street, P.O. Box 2626, Fargo, ND 58802-1525, on behalf of BNSF Railway Company.

Annette Bendish, Legal Counsel, Public Service Commission, 600 E Boulevard Ave, Dept. 408, Bismarck, ND 58505, on behalf of the Public Service Commission.

Bonny M. Fetch, Administrative Law Judge, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, ND 58501-1882, as Procedural Hearing Officer.

**Preliminary Statement**

On January 8, 2010, BNSF Railway Company (BNSF) filed an application requesting the Commission review the Fraine Barracks railroad crossing in Bismarck, North Dakota, and asked the Commission to issue an order under North Dakota Century Code section 49-10.1-21 determining whether this crossing is a public or private railroad crossing, and if private, if audible devices warning of a train's approach should be sounded at this crossing under North Dakota Century Code section 49-11-21.

On January 27, 2010, the Public Service Commission issued a Notice of Hearing scheduling a hearing for March 1, 2010, at 1:30 p.m. in the Brynhild Haugland Room, Ground Floor, State Capitol, 600 E Boulevard Ave, Bismarck, North Dakota. The Notice of Hearing identified the following issues to be considered:

1. Whether the Fraine Barracks railroad crossing (DOT #087680P) is a public or private railroad crossing as defined by Section 49-10.1-21.
2. If the Fraine Barracks railroad crossing (DOT #087680P) is a private crossing, whether the railroad should sound a warning device based on the safety concerns of the public.

On March 1, 2010, at 1:30 p.m., the public hearing was held in the Brynhild Haugland Room. Lynn Leibfried, P.E., Manager Public Projects, BNSF, presented evidence by affidavit and in response to questions from the Commission. Members of the public also offered testimony.

On April 8, 2010, the Commissioners sent a letter to the City of Bismarck requesting additional information regarding the Fraine Barracks crossing area and asking whether the City of Bismarck had any intent to restrict access to that area.

On May 5, 2010, the Commission received a letter from the City of Bismarck outlining a proposal to restrict access to the Fraine Barracks crossing area.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed and considered all testimony and evidence presented, the Commission makes the following:

### **Findings of Fact**

1. In response to the amendments to North Dakota Century Code section 49-11-21 resulting from passage of 2009 House Bill 1342, BNSF has been removing whistle posts at private grade crossings in North Dakota.
2. In the process of removing those whistle posts, BNSF was unable to determine whether the Fraine Barracks crossing (DOT #087680P) was public or private and, if private, identified the Fraine Barracks crossing as one which the Commission may wish to review to determine whether, as a matter of public safety, the Commission in the exercise of its jurisdiction may direct that audible warnings of a train's approach be sounded.
3. The City of Bismarck identified the road that intersects with the railroad tracks as an unnamed, two-lane asphalt trail which constitutes an extension of Shafer Street north across the railroad tracks to the gated fence that controls access onto Fraine Barracks and from which the road continues through Fraine Barracks and extends out on the other side.
4. The City of Bismarck and the National Guard plow snow and otherwise maintain the road that intersects with the railroad tracks.
5. The City of Bismarck is a public authority.
6. The National Guard, as a state agency, is also a public authority.
7. Both sides of the road at the Fraine Barracks crossing are maintained by public authorities.

8. There are approximately 300 motor vehicle movements over the railroad tracks at the Fraine Barracks crossing each day, and about 22 trains each day.

9. Photographs for the Fraine Barracks crossing show a curve in the tracks, some trees and other vegetation that may restrict the view of motorists and train crews as they approach the crossing.

10. Ron Huff of the Brotherhood of Locomotive Engineers and Trainmen testified at the hearing that the speed of trains at the Fraine Barracks crossing is approximately 16 mph and not more than 35 mph.

11. There have been two incidents involving a collision between a train and a motor vehicle at the Fraine Barracks crossing; one in 1998 and the other in 1986, both prior to restrictions at the crossing subsequently implemented by the North Dakota National Guard.

12. In its May 5, 2010 letter to the Commission, the City of Bismarck proposed modifications to the Fraine Barracks crossing area to restrict access and add additional layers of safety. Specifically, the city proposes:

1. Posting a sign on Schafer Street at the south entrance to the NECE building stating that no public access is allowed south of that point. The actual wording will be provided by the city Traffic Engineer.
2. Posting a sign north of the crossing on this trail that says: 'Railroad Crossing; All traffic must stop.' The number of tracks is also normally listed. The wording will be provided by the city Traffic Engineer.
3. Upgrading the size of stop signs on the north approach to the crossing and post on both sides of the trail.
4. Focusing a security camera in Fraine Barracks on the crossing to record drivers who do not stop at the crossing.
5. The Adjutant General will discipline non-compliant drivers by eliminating their gate privileges.
6. Fencing the area between the railroad and the existing National Guard fence to insure no access south of the tracks except into Fraine Barracks. A gate will be installed in these new fences north and south of the access road to allow railroad maintenance of the right-of-way.
7. The National Guard will continue to perform sanding and snow maintenance on the road north and south of the crossing to promote driver safety.
8. The brush and trees that presently exist near the Fraine Barracks fence line will be removed or pruned in such a way as to not constitute a sight distance impairment for drivers.
9. If the trees and brush on the north side of the railroad track west of the crossing are determined to be a sight distance

impediment they should be ordered removed or pruned. If assistance with the removal or pruning is needed the City of Bismarck will attempt to assist.

From the foregoing Findings of Fact, the Commission now makes its:

### **Conclusions of Law**

1. The Commission has jurisdiction under North Dakota Century Code sections 49-10.1-21 and 49-11-21 to determine if the Fraine Barracks crossing is public or private, and if private, to order railroads to sound audible warning devices based on the safety concerns of the public.

2. The road that intersects with the Fraine Barracks crossing is maintained by a public authority on both sides, therefore the Fraine Barracks Crossing is currently a public railroad crossing as defined in North Dakota Century Code section 49-11-00.1. However, the modifications proposed by the City of Bismarck to the Fraine Barracks crossing area would restrict access to the area and provide an additional layer of safety.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

### **Order**

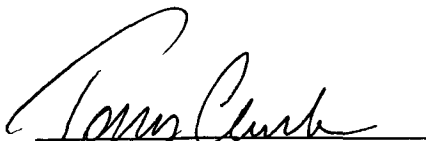
The Commission orders:

1. Fraine Barracks crossing (DOT #087680P) is currently a public railroad crossing, and as such, federal whistle regulations apply.

2. After the modifications are made to the Fraine Barracks crossing area as stated in the May 5, 2010 letter from the City of Bismarck to the Commission the crossing will be a private crossing.

3. After the modifications are made to the Fraine Barracks crossing area as stated in the May 5, 2010 letter from the City of Bismarck to the Commission, audible devices warning of a train's approach should not be sounded at this crossing, unless there is an exception as stated in North Dakota Century Code 49-11-21.

### **PUBLIC SERVICE COMMISSION**



**Tony Clark**  
**Commissioner**



**Kevin Cramer**  
**Chairman**



**Brian P. Kalk**  
**Commissioner**