

Exhibit No. ____ (KH-13)
Dockets TR-100127,
TR-100128, TR-100129, and
TR-100131 (*consolidated*)
Witness: Kathy Hunter

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,**

Petitioner,

v.

**CENTRAL PUGET SOUND REGIONAL
TRANSPORTATION AUTHORITY
AND THE CITIES OF LAKEWOOD
AND DUPONT,**

Respondents.

**DOCKETS TR-100127,
TR-100128, TR-100129, and
TR-100131 (*consolidated*)**

EXHIBIT TO

TESTIMONY OF

KATHY HUNTER

STAFF OF

**WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

*Docket TR-990656 – Order Approving and Adopting
Settlement Agreement; Granting Petition*

May 7, 2010

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In the Matter of the Petition of)	
)	DOCKET NO. TR-990656
THE BURLINGTON NORTHERN)	
AND SANTA FE RAILWAY)	
COMPANY)	
)	ORDER APPROVING AND
To Increase Passenger and Freight)	ADOPTING SETTLEMENT
Train speeds on BNSF's Railroad)	AGREEMENT; GRANTING
Between the Southern Most)	PETITION
Boundary of Seattle's City Limits to)	
the Northern Most Boundary of the)	
City of Tacoma)	
.....)	

SYNOPSIS: The Commission approves a settlement agreement that provides for increased train speeds over BNSF's tracks in Puyallup, Washington, subject to conditions that satisfy concerns expressed by the City of Puyallup.

SUMMARY

- 1 **PROCEEDINGS:** The Burlington Northern and Santa Fe Railway Company (BNSF) filed a request on March 29, 1999 to increase train speed limits in Puyallup to those allowed by the Federal Railroad Administration (FRA). FRA allows freight trains to travel at speeds up to 60 mph and passenger trains at speeds up to 79 mph on the class of tracks maintained by BNSF through Puyallup. The City of Puyallup (City) filed a request for an adjudication on September 5, 2000.

- 2 **PARTIES:** Robert E. Walkley, Attorney at Law, Sammamish, Washington, represents BNSF. Arthur Fitzpatrick, Puyallup City Attorney, Puyallup, Washington, represents intervenor City of Puyallup. Elizabeth Thomas, Preston Gates & Ellis LLP, Seattle, Washington, represents intervenor Sound Transit. Jeffrey D. Stier, Assistant Attorney General, Olympia, Washington, represents intervenor Washington State Department of Transportation (WSDOT). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents Commission Staff (Staff).

3 **SETTLEMENT:** BNSF and the City reached an agreement to resolve all issues raised by the City's request for an adjudication.

4 **COMMISSION:** The Commission approves BNSF and the City's settlement, adopts the settlement as a full and final resolution of the issues pending in this proceeding, grants the City's withdrawal, and vacates existing speed limit orders applicable within the Puyallup city limits on the conditions set forth in this Order.

MEMORANDUM

5 BNSF filed a request on March 29, 1999 to increase train speed limits in Puyallup to those allowed by the Federal Railroad Administration (FRA). FRA allows freight trains to travel at speeds up to 60 mph and passenger trains at speeds up to 79 mph on the class of tracks maintained by BNSF through Puyallup. Current state-imposed speed limits are 30 mph for freight trains except that they may travel at 50 mph from just east of 15th Street S.E. to the eastern city limits. The passenger train speeds are 65 mph from the eastern city limits to 15th Street S.E., 30 mph from 15th Street S.E. to 2nd Street S.E., 40 mph from 2nd Street S.E. to 7th Street N.W., and 75 mph from 7th Street N.W. to the western city limits. In a previous order issued under Docket No. TR-2250, the Commission approved an increase in passenger train speeds from 30 mph to 65 mph in the area from 15th Street S.E. to 2nd Street S.E. to be effective when repeater traffic signals are installed at 15th Street S.E.

6 BNSF owns and maintains double mainline tracks in Puyallup and operates freight trains on them. BNSF sets speeds within legal limits for its freight trains and for passenger trains operated by the National Passenger Railroad Corporation (Amtrak) and for commuter trains operated by Sound Transit, which also operate on BNSF tracks through Puyallup. BNSF seeks to increase train speed limits to enhance the efficiency of its operations and the operations of Sound Transit and Amtrak.

7 The City of Puyallup, Sound Transit, and the Washington State Department of Transportation were granted leave to intervene in the proceeding. The City requested an adjudicative hearing. Because BNSF petitioned to increase the speed limits on its tracks within the city limits of Puyallup to those established by the FRA, the City

and/or Staff had the burden of showing that a lower Commission-ordered limit was necessary to eliminate an "essentially local safety hazard."¹

- 8 After a prehearing conference, the parties other than Commission Staff began a series of negotiations. An agreement was reached and memorialized by a Memorandum of Understanding (Memorandum). A copy of the Memorandum is attached to this Order as Attachment A, which is adopted by reference as a part of this Order. Pursuant to the Memorandum, the City filed a motion to withdraw its request for an adjudicative hearing.
- 9 BNSF agrees to abide by the terms of the Memorandum and of this Order as a compromise in settlement of potentially extensive litigation over the Commission's jurisdiction. If, however, the Commission deems it necessary to enforce the terms of this Order, BNSF reserves the right to defend against such an enforcement action.
- 10 Because BNSF's commitments to the City under paragraphs 1.1 and 1.2 of the Memorandum are not so obviously related to mitigating rail-related safety hazards, the parties agree that the City should seek enforcement of those commitments in a different venue if it becomes necessary to do so.
- 11 BNSF agreed in the Memorandum to increase train speeds incrementally upon the completion of certain grade crossing projects. In agreeing to this incremental approach, BNSF relied on the good faith efforts of the City to expeditiously complete, or help complete, the projects listed in the Memorandum. If it becomes necessary to do so, BNSF may petition the Commission pursuant to RCW 81.53.140 to set a date certain for completion of any or all work to be performed by the City. Dates need not be set at this time.

¹ The Commission recently codified this assignment of the burden of proof at WAC 480-62-155(2)(c)(i), which provides:

When a railroad company files a petition to modify an existing limit set by the commission to or within a federally set speed limit, . . . the railroad will be deemed to have met its burden of proof as to why the speed limit should be modified. The burden then shifts to the governing body of the local government, commission staff, or other interested persons to show that there exists "an essentially local safety hazard," and that a speed limit different from that proposed by the railroad company is necessary to eliminate or reduce the hazard.

12 Staff and BNSF agree to two conditions not addressed in the Memorandum. First, although BNSF agreed to continue to abide by the speed limits set forth in TR-2250 until certain projects are completed, Staff agrees that BNSF need not observe those limits as rear-end restrictions but may instead observe them as head-end restrictions. This is acceptable to the Commission.

13 Second, BNSF agrees that the condition imposed in the Commission's order in TR-2250 requiring the installation of a repeater signal at 15th Street S.E. before speed limits increase at that crossing will be carried forward as a condition of this order. A head-end restriction at 15th Street S.E. of 30 mph should remain in effect until the repeater signal is installed and found by Commission Staff to be working properly. This is also acceptable to the Commission.

14 BNSF and the City also agreed in the Memorandum that BNSF will conduct additional Operation Lifesaver presentations in the school district. The Commission endorses this effort, but will not impose it as a condition.

FINDINGS OF FACT

15 The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to fix and regulate the speed of railway trains within the limits of any city or town other than a first class city, but subject to limitations imposed by federal statute and regulations.

16 The Burlington Northern and Santa Fe Railway Company is a railroad company that owns and maintains double mainline tracks in Puyallup and operates freight trains on them. BNSF sets speeds within legal limits for its freight trains and for passenger trains operated by the National Passenger Railroad Corporation (Amtrak) and for commuter trains operated by Sound Transit, which also operate on BNSF tracks through the City of Puyallup.

17 On March 29, 1999, BNSF filed a request to increase train speed limits in Puyallup to those allowed by the Federal Railroad Administration.

18 On September 5, 2000, intervenor the City of Puyallup requested an adjudication of this matter.

19 On August 20, 2001, the City and BNSF filed a Memorandum of Understanding resolving the issues raised by the City's request for an adjudication. Consistent with its agreement with BNSF, the City filed a motion to withdraw its request for an adjudication on August 20, 2001.

20 At a Conference before ALJ C. Robert Wallis on September 20, 2001, Staff and BNSF presented a form of order, which reflects the stipulation of all parties, for the Commission's approval. This Order represents a conformed version of form of order presented by Staff and BNSF.

CONCLUSIONS OF LAW

21 The Washington Utilities and Transportation Commission has jurisdiction over the subject matter and the parties, subject to the limitations imposed by federal law.

22 The Commission concludes that it is in the public interest to approve the settlement of the parties to this matter and to vacate prior speed limit orders in the city of Puyallup subject to the conditions stated below.

23 Subject to the limitations imposed by federal law, the Commission retains jurisdiction to effectuate the provisions of this Order.

ORDER

24 THE COMMISSION ORDERS That:

25 (1) The City's motion to withdraw its previous request for an adjudicative hearing is granted.

26 (2) The Memorandum of Understanding attached as an Appendix to this Order is accepted and adopted here by reference, as if set forth in the body of this Order, as a full and final settlement of the issues in this case between BNSF and the City.

27 (3) Subject to the conditions set forth below, all previous speed limit orders pertaining to the City of Puyallup are vacated.

- 29
- 28 (4) BNSF must notify the Commission four months before any increase above 79
mph for passenger or 60 mph for freight trains within the city limits of
Puyallup.
- 29 (5) The phased speed increases, the change to head-end restrictions, and the work
preceding each increase provided in Exhibit A and Appendix B of the
Memorandum are hereby adopted and ordered, with the following conditions:
- 30 (a) Except at 15th Street S.E., where the speed will remain 30 mph until
the conditions in the next subparagraph are satisfied, BNSF may now
implement Phase I speed increases and head-end restrictions.
- 31 (b) BNSF may increase speeds above 30 mph as requested at 15th Street
S.E. and implement the increases in Phase II upon installation of the
planned 15th Street S.E. repeater traffic signal and written verification
by Commission Staff, within ten days of notification by BNSF, that
the signal is installed and functions as intended.
- 32 (c) BNSF may implement the increases in Phase III upon completion of
the improvements specified in Appendix B and written verification by
Commission Staff within ten days of BNSF's notification that the
improvements are installed and function as intended.
- 33 (d) BNSF shall not implement Phase IV or raise freight train speeds above
50 mph before January 1, 2003. BNSF must notify the City at least
four months before raising freight train speeds above 50 mph.
- 34 (6) BNSF may request that a date be set for the City's performance of any work
required in the Memorandum pursuant to RCW 81.53.
- 35 (7) The Commission retains jurisdiction to enforce this and all prior orders
entered in this proceeding.

DOCKET NO. TR-990656

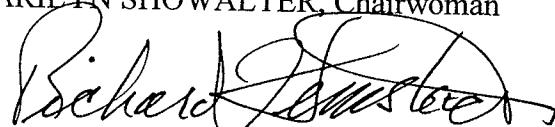
PAGE 7

DATED at Olympia, Washington, and effective this 23rd day of October, 2001.

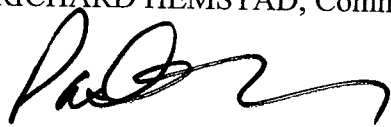
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



MARILYN SHOWALTER, Chairwoman



RICHARD HEMSTAD, Commissioner



PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

297

MEMORANDUM OF UNDERSTANDING

WHEREAS, the City of Puyallup ("City") filed a request for adjudication to the Washington Utilities and Transportation Commission ("WUTC") in order to oppose train speed increases on tracks of The Burlington Northern and Santa Fe Railway Company ("BNSF"); and

WHEREAS, the City initiated its request for an adjudicative proceeding because of its grave concerns regarding the potential impacts of such train speeds upon its community and the safety of its citizens; and

WHEREAS, the City recognizes that federal preemption creates a difficult burden of proof and the potential for expensive, lengthy litigation and appellate review of these issues; and

WHEREAS, the parties wish to resolve their dispute, as framed in the pleadings filed in this proceeding, by the City's withdrawal of its request for an adjudicative procedure in consideration of BNSF's agreement to phase increases of the train speeds; and

WHEREAS, while the City and BNSF both believe their position to be correct, they wish to resolve their differences amicably by entering into this Memorandum of Understanding;

NOW, THEREFORE, the City and BNSF enter into this Memorandum of Understanding in consideration of the mutual promises set forth herein.

An administrative proceeding (Docket No. TR-990656) is currently pending before the Washington Utilities and Transportation Commission ("WUTC") regarding increasing train speed limits within the City on tracks of the BNSF. The City opposed the speed increases and was granted an adjudicative proceeding before the WUTC. BNSF contends that WUTC is without jurisdiction or authority by virtue of 49 U.S.C. §20106 to impose any conditions or restrictions on the speed increases contemplated in Exhibit "A." To resolve the issues between them, the City and BNSF have agreed as follows.

1. BNSF undertakes:

1.1 To cooperate with the City in the preparation of an appropriate Construction, Maintenance and Operation ("CM&O") agreement in the standard BNSF form documenting BNSF's portion of the City's FAST Shaw Road Project when the City has completed design and other normal details of the project.

1.2 To pay to the City \$750,000 in installments in support of the Shaw Road Project as BNSF's share of overall FAST project commitments on such dates as will be specified in the CM&O Agreement.

1.3 To give Operation Lifesaver presentations in the Puyallup School District in cooperation with the District to educate citizens (including students) on railroad safety.

1.4 To phase in the train speed increases gradually as specified in Exhibit "A."

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2. The City undertakes:

2.1 To withdraw its request for an adjudicative proceeding and its opposition in all administrative and judicial forums to the speed increases phased in as provided in Exhibit "A".

2.2 Not to impede BNSF in the presentation of evidence before the WUTC if there is a brief hearing for the record regarding the provisions of this Memorandum of Understanding.

2.3 To perform with reasonable dispatch the agreed upon City's portion of the crossing work as specified in the attached Exhibit "A" and Appendix "B" in time to meet the implementation dates.

3. The undertakings herein are separate contractual obligations and may be enforced by a court of competent jurisdiction through injunctive relief. The parties stipulate that violations of the terms of this Memorandum are not subject to recompense by monetary damages. Venue for actions hereunder shall lie in state or federal court in the State of Washington.

4. This is the entire agreement between the parties. Any prior understandings, written or oral, shall be deemed merged with its provisions. Should any portion of this agreement be deemed by a court of competent jurisdiction to be void or unenforceable then this agreement shall be terminable at the option of either party upon written notice.

5. This Memorandum is a document in settlement of litigation and shall not be construed as an admission by either party as to any issue contested in the case.

SIGNED as of the day first herein written.

ATTEST:

CITY OF PUYALLUP

Judy G. Thomas, Deputy City Clerk
City Clerk

Don Malloy
Mayor Don Malloy

APPROVED AS TO FORM:

W. Scott Snyder
W. Scott Snyder

ATTEST:

THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY

Margaret Aclen
Witness

W. Scott Snyder
Associate General Counsel

EXHIBIT "A"**To the BNSF/City of Puyallup
Memorandum of Understanding**

Phase I. Change the Freight Rear-End Restriction ("RER") to a Head-End Restriction ("HER") of F-40 from 15th SE to 12th NW. Freight train speeds will increase to F-50 only after head end of train passes every Puyallup grade crossing. Passenger speeds will be P-40 from 15th SE to 7th NW. *Immediate Implementation.*

Phase II. The City shall complete installation of a repeater signal at 15th SE by July 1, 2001 or as soon thereafter as the repeater signal can be installed consistent with public bidding timelines. The HER limits will then be moved from 15th SE to 5th SE, allowing speeds of P-65/F-50 between 15th SE and 5th SE. Speeds will remain P-40/F-40 west of 5th SE. As at present, Passenger speed increases to P-75 at 7th NW and Freight speed increases to F-50 at 12th NW. *July 1, 2001 implementation.*

Phase III. BNSF and the City shall complete the grade crossing changes specified in the Sound Transit Diagnostic Study (summarized in Appendix "B") by July 1, 2002. Speeds will change to P-79/F-50 with no HER. *July 1, 2002 implementation.*

Phase IV. At a date after Phase III, depending on BNSF's requirements, speeds will change to P-79/F-60 with no HER. BNSF will notify the City with a reasonable lead-time (about 4 months) before this Phase is implemented. *Implementation no earlier than January 1, 2003.*

APPENDIX B
Crossing Warning Device Improvements

15th Street SE

Confirm that circuitry has been upgraded to allow constant warning.
Install raised medians on the north approach to the crossing.
Install repeater highway traffic signals on the north approach to the crossing.

5th Street SE

Confirm that circuitry has been upgraded to allow constant warning.
Install raised medians on both approaches to the crossing.
Upgrade signals.
Install preemption circuitry.

2nd Street SE

Confirm that circuitry has been upgraded to allow constant warning.
Install preemption circuitry.

Meridian Street

Confirm that circuitry has been upgraded to allow constant warning.
Upgrade signals.
Lights should face both directions despite Meridian being a one-way street (better warning for pedestrians).
Install advanced preemption circuitry (subject to confirmation of need from the city).

5th Street NW

Confirm that circuitry has been upgraded to allow constant warning.
Upgrade the signals.
Install raised medians on both approaches.

7th Street NW

Confirm that circuitry has been upgraded to allow constant warning.
Provide preemption circuitry for use with future signalization of nearby traffic intersection.

12th Street NW

Confirm that circuitry has been upgraded to allow constant warning.
Upgrade the signals.
Install raised medians on the south approach.
Install preemption circuitry for use with future signalization of nearby traffic signal.