

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

<p>CITY OF WENATCHEE,</p> <p>Petitioner,</p> <p>v.</p> <p>BURLINGTON NORTHERN SANTE FE RAILWAY,</p> <p>Respondent.</p>	<p>DOCKET TR-220540</p> <p>ORDER 02</p> <p>ORDER GRANTING LEAVE TO AMEND AND RESPOND; GRANTING EXEMPTION; AND SUSPENDING PROCEEDINGS</p>
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**BACKGROUND**

1 On July 15, 2022, the City of Wenatchee (City or Petitioner) filed with the Washington Utilities and Transportation Commission (Commission) a Petition to Modify Highway-Rail Grade Crossing Warning Devices (Petition). The Petition sought to modify warning devices at the crossing at 9th Street in Wenatchee, Washington, identified as USDOT 065838N.

2 Burlington Northern Santa Fe Railway (BNSF or Respondent) did not consent to entry of a Commission order without hearing. On August 8, 2022, BNSF filed a response by email to Staff expressing material opposition to the Petition.<sup>1</sup>

2022-2025

3 The City’s Petition involves a modification to highway-rail grade crossing warning devises at the City’s 9th street crossing.<sup>2</sup> The Petition was originally filed on July 15, 2022, and was set to be heard on May 22, 2023.<sup>3</sup> In April 2023, proposed testimony and exhibits were filed.

4 On April 18, 2023, the administrative law judge (ALJ) issued a notice suspending the schedule, so as to accommodate the parties’ request for a pause to settle the matter without going to hearing. On July 31, 2023, BNSF and the City informed the previous ALJ that “we just need to work through a maintenance agreement and then should be in a

<sup>1</sup> The email chain was filed in the docket on August 15, 2022.

<sup>2</sup> Hughes, TR 17:9-11.

<sup>3</sup> *City of Wenatchee v. BNSF Railway Co.*, Docket TR-220540, Order 01, Prehearing Conference Order; Notice of Hearing (Oct. 27, 2022).

position to resolve the case.”<sup>4</sup> The ALJ requested an update on the proposed settlement by September 1, 2023.<sup>5</sup>

5 On September 11, 2023, the parties informed the ALJ that “[t]he City and BNSF tentatively agreed to a design change and yet need to work through a construction and maintenance agreement.”<sup>6</sup> The former ALJ requested a further update by October 1, 2023. No update was given.<sup>7</sup>

6 On January 29, 2025, the writing ALJ was assigned to this matter and requested an update; the parties told the ALJ that an agreement had been made and an update would be coming in “the next couple of weeks or so.”<sup>8</sup>

7 On May 29, 2025, the ALJ requested another update and was again informed that an agreement had been made and steps were being taken for final approval.<sup>9</sup>

*August 2025 Conference and subsequent filings*

8 On August 4, 2025, the ALJ convened a second prehearing conference.<sup>10</sup>

9 BNSF explained the delays as the result of turnover of counsel, due in part to the evolving nature of the underlying dispute, which transitioned from federal litigation to alternative resolution closer to contract negotiation.<sup>11</sup> We accept this explanation. However, we kindly ask for future mindfulness of Washington Administrative Code (WAC) 480-07-345(2)(d) – the filing of withdrawal of counsel, which are a “must.”

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<sup>4</sup> Hughes, TR 17:16-19. *Smith*, Docket TR-220540, *Email Exchange from Steve Smith* (July 31, 2023).

<sup>5</sup> Hughes, TR 17:29-30. *City of Wenatchee v. BNSF Railway Co.*, Docket TR-220540, Notice Suspending Procedural Schedule; Canceling Hearing; Requiring Settlement Filing or Status Update (April 18, 2023).

<sup>6</sup> Hughes, TR 17:21-24.

<sup>7</sup> Hughes, TR 17:24-25.

<sup>8</sup> Hughes, TR 18:2-6.

<sup>9</sup> Hughes, TR 18:7-10.

<sup>10</sup> Hughes, TR 17:1-8. *City of Wenatchee v. BNSF Railway Co.*, Docket TR-220540, Notice of Second Prehearing Conference (June 3, 2025).

<sup>11</sup> Emch, TR 25:1-13.

- 10 No party moved for default.<sup>12</sup> No settlement was presented.<sup>13</sup> When asked if the dispute at issue had been resolved by a settlement, which was not presented to the presiding officer prior to execution, the parties were unclear. When asked about the absence of a settlement, Staff counsel opined that generally the settlement agreements are not submitted for approval because the statute recognizes that the parties may contract instead of request an adjudication pursuant to Revised Code of Washington (RCW) 81.53.261.<sup>14</sup> The relationship between the settlement agreement and a withdrawal was discussed.<sup>15</sup> The parties promised to huddle and subsequently inform the presiding officer of the position of the parties and bring any necessary motions to so effectuate.<sup>16</sup>
- 11 On August 14, 2025, the City and BNSF (Stipulating Parties) filed a Stipulated Motion for leave to amend the Petition, and attached an Amended Petition, which “updates the railroad traffic information for the crossing, includes additional specificity for the changes at the crossing, and provides that the construction and maintenance agreement between Wenatchee and BNSF would govern the parties’ responsibilities for annual maintenance costs.”<sup>17</sup>
- 12 The Amended Petition (formatted like an application) contains four attachments: crossing illustrations; a 2017 Railway-Highway Crossings Program (Section 130) Application for Funding; a Highway-Rail Grade Crossing Diagnostic Evaluation Report; and, a U.S. DOT Crossing Inventory.<sup>18</sup> On page 8 of the application in the Amended Petition,<sup>19</sup> where concerned parties can indicate they do not wish an adjudicated hearing, the space

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<sup>12</sup> Hughes, TR 19:14-20.

<sup>13</sup> Roberson, TR 19:21-24.

<sup>14</sup> Roberson, TR 22:11-20.

<sup>15</sup> Hughes, TR 30:18-23.

<sup>16</sup> Hughes, TR 37:1-11.

<sup>17</sup> Staff’s Response to Motion to Stipulate at ¶ 4; *see also City of Wenatchee v. BNSF Railway Co.*, Docket TR-220540, Notice of Amended Petition (August 14, 2025).

<sup>18</sup> *But* WAC 480-07-140(6)(b) (“The cover letter accompanying the submission must list all of the documents included in the submission using the same identifying information.”).

<sup>19</sup> *City of Wenatchee v. BNSF Railway Co.*, Docket TR-220540, Stipulated Motion For Leave to Amend Petition at 11 (August 14, 2025); Notice of Amended Petition (August 14, 2025) (“Respondent respectfully reserves the right to a hearing in the event the Amended Petition is not accepted or the design changes for the crossing are not approved by the WUTC.”).

is blank - a representative of BNSF did not so indicate.<sup>20</sup> The Amended Petition did not include the agreement which resolved this dispute referred to by BNSF and the City.

- 13 On August 18, 2025, Staff moved for leave to respond to the Stipulated Motion and attached a proposed response (Staff’s Response). Staff recommended that the presiding officer grant the City’s motion for leave to amend the Petition. Staff’s counsel represents, and the record confirms, that there has been agreement among the parties that an evidentiary hearing does not appear to be needed. To achieve the consensus position of resolution, Staff recommended construing BNSF’s August 14<sup>th</sup> “Notice” as a sufficient motion to withdraw from this adjudication, bringing the adjudication to a close, for further disposition by delegated order.<sup>21</sup> Staff suggested that it was possible to construe the Amended Petition filing as a settlement.<sup>22</sup> The Stipulating Parties have expressed support.<sup>23</sup>
- 14 On August 25, 2025, the Stipulating Parties filed a Corrected Stipulated Motion, which included a corrected version of the Amended Petition (Corrected Amended Petition). Similar to the Amended Petition, the Corrected Amended Petition did not include either a waiver of the hearing by BNSF or a copy of the agreement that resolved the dispute between BNSF and the City. Along with the Corrected Amended Petition,<sup>24</sup> the Stipulated Motion states in its entirety:

Pursuant to WAC 480-07-375, Petitioner moves the Commission for an Order authorizing the amendment of its Petition to Modify Warning Devices at a Highway-Railroad Grade Crossing as set forth on Exhibit “A” attached hereto. Respondent stipulates and agrees to the motion.  
THIS MOTION is based upon the Petitioner and Respondent resolving the issues between them and entering into a Grade Crossing Construction and Maintenance Agreement with design changes for the crossing as negotiated between them.

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<sup>20</sup> See also Emch, TR 31:17-18 (“But he explained that because we didn't check the waiver, we technically requested one.”); Smith, TR 30:9-11 (“BNSF didn’t waive its right to a hearing. So I think that's really what we are talking about.”).

<sup>21</sup> Staff’s Response at ¶¶ 5, 15-17.

<sup>22</sup> Staff’s Response at ¶ 14.

<sup>23</sup> BNSF Railway Company Response And Statement Of No Objection To WUTC Commission Staff’s August 18, 2025 Filings at 1:10-13 (“BNSF . . . respectfully states that it has no objection to the WUTC Commission Staff’s Motion For Leave To Respond and Response. . . or the proposed procedural process and requested relief described[.]”).

<sup>24</sup> But WAC 480-07-395(c)(v)(B); WAC 480-07-395(c)(vii).

15 We will refer to the post-hearing submissions collectively as the 2025 Filings.

### Discussion and Decision

16 Staff's attempt to "cut a procedural Gordian Knot" is appreciated. However, we adopt a different approach with a similar outcome. Prior to that, we address two bookkeeping matters related to the 2025 Filings.

#### *Granting Procedural Motions*

17 First, we acknowledge that this Order is tardy. Due to the press of business and the time constraints of the presiding officer, evaluation of the process presented by the parties has been delayed to here and now in 2026, well past the expected time.<sup>25</sup>

18 Second, Stipulating Parties' motion to amend the Petition and Staff's motion for leave to respond are both granted. Both filings bring this matter incrementally closer to a conclusion, and have been considered by the ALJ in the issuance of this Order.

19 Turning to Staff's recommendation. While it would be expedient to accept the proposed cut, we proceed by untangling. While we agree with Staff that we could treat the notice as a motion to withdraw, that too would be subject to the requirements of WAC 480-07-380(3)(a), absent exemption.<sup>26</sup>

20 The statute which this process is predicated on calls for the Commission to determine the binary question of whether the evidence is or is not "required" by "public safety."<sup>27</sup> In addition, "[t]he commission shall also at said hearing apportion the entire cost of installation and maintenance of such signals or other warning devices."<sup>28</sup> Any withdrawal filed in this docket as a result of an agreement which resolves the dispute should aim to answer those questions, because that is the standard by which the settlement would be reviewed for approval.<sup>29</sup> A party may avail themselves of submitting appropriate

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<sup>25</sup> Hughes, TR 29:1-4. RCW 34.05.434; WAC 480-07-430(1)(c); 480-07-110.

<sup>26</sup> *But see* WAC 480-07-380(3)(a) ("The motion must include any settlement or other agreement pursuant to which the party is seeking withdrawal."); Corrected Stipulated Motion to Amend (Aug. 26, 2025) ("THIS MOTION is based upon the Petitioner and Respondent resolving the issues between them and entering into a Grade Crossing Construction and Maintenance Agreement with design changes for the crossing as negotiated between them.").

<sup>27</sup> RCW 81.53.261.

<sup>28</sup> RCW 81.53.261.

<sup>29</sup> RCW 480-07-740 ("The commission will review all settlement agreements to determine whether they comply with applicable legal requirements and whether approval of the agreements is consistent with the public interest.").

materials in seeking approval or requesting to withdraw due to agreement.<sup>30</sup> Staff's Response proposes we that we may treat the 2025 filings as a sufficient settlement agreement.<sup>31</sup> We decline to do so - there is information related to public safety and cost apportionment in the documentation, but overall the 2025 Filings have not been submitted or presented in the form of a settlement as we would wish to see in a WAC 480-07-380(3)(a) analysis.<sup>32</sup> We proceed with a smaller interpretive fiction.

*Adjudication Resolution*

- 21 The posture of the case is that an adjudicative process has been triggered; the parties have not submitted a settlement in proper form; nor has a party properly moved to withdraw or dismiss the matter. Conversely, discovery is complete and the matter is ripe. However, in lieu of setting a schedule for a hearing - as we generally would after a pre-hearing conference like the one held in August - the conservation of administrative resources requires the ALJ to delay scheduling this chapter 81.53 RCW matter for the final time.
- 22 We move forward, endeavoring to accomplish the apparent joint intent of the parties, provide a clear record, and to enable meaningful review. Subject to a subsequent filing, we deem the matter to be non-justiciable and dismiss the adjudication pursuant to WAC 480-07-380, so that the stipulated parties may proceed by other process. We briefly explain the distinction from what was presented in the 2025 Filings.
- 23 We begin by noting that there is a difference between the Commission granting withdrawal because the underlying matter has a proposed settlement on the merits and dismissing because there is no conflict and the matter is no longer justiciable; culminating versus abandoning.<sup>33</sup> A dismissal motion moots the matter and allows for immediate closure of the docket as a non-justiciable adjudication.<sup>34</sup> Staff eludes to this in

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<sup>30</sup> WAC 480-07-380(3)(a); *see also* WAC 480-07-740(3) ("Settlement presentation. When submitting a settlement agreement for commission approval, the settling parties must include supporting documentation sufficient to demonstrate that the settlement is consistent with the law and the public interest.").

<sup>31</sup> Staff's Response at ¶¶ 13-14.

<sup>32</sup> WAC 480-07-140.

<sup>33</sup> Hughes, TR 32:3-9 ("If one party would like to leave because there has been some settlement, 480-07-380 gives you the mechanism to do that. [However,] [i]f you are no longer disputing it, it is -- looks less like an adjudication because there are not two parties in dispute, in which case it's just the City of Wenatchee asking to do something," subject to commission approval.).

<sup>34</sup> WAC 480-07-380(1)(a). A question of whether a claim is justiciability incorporates the traditional doctrines of standing, mootness, and ripeness. *City of Longview v. Wallin*, 174 Wn. App. 763, 778 (2013). *C.f. Raynes v. Leavenworth*, 118 Wn.2d 237, 247 (finding a matter to be

its Response to the Amended Petition, stating “Wenatchee and [B]NSF are no longer truly adverse parties.”<sup>35</sup>

- 24 The Commission rules call for liberal interpretations of motions so as to effectuate intent.<sup>36</sup> We do choose to use the broad interpretation standards adopted by the Commission, but we characterize the 2025 Filings in a different frame. Consistent with the discussion below, it is appropriate to “close this adjudication” and send the matter to a delegated order process.<sup>37</sup>
- 25 First, we posit at this point that the cold record of this matter is not entirely unambiguous. At hearing, the respondent indicated they do not withdraw their request for hearing absent knowledge of final agency approval, so as to maintain the ability to contest any conditions that may be imposed.<sup>38</sup> The Corrected Amended Petition supersedes the previous petitions – but like its predecessors the Section 13 Waiver page remains unsigned.<sup>39</sup> If looking only at the papers, this matter could reasonably be interpreted as being still in a quasi-judicial position.<sup>40</sup> In the interest of clarifying the closure of this record: waiver should be unambiguous. To cure this, this Order requires the Parties to refile a corrected superseding petition with the Section 13 filled out prior to this docket being scheduled for a regularly scheduled open meeting.
- 26 RCW 81.53.261 requires that the Commission grant approval prior to modifying a public railroad-highway grade crossing within the state of Washington, when the evidence requires such changes for public safety. In addition to the hearing right, RCW 81.53.261

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quasi-judicial because it was to “determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.”).

<sup>35</sup> Staff’s Response at ¶ 14.

<sup>36</sup> WAC 480-07-740(4) (“Liberal construction of pleadings and motions. The commission will liberally construe pleadings and motions with a view to effect justice among the parties. The commission will consider pleadings and motions based primarily on the relief they request and will not rely solely on the name of the document.”).

<sup>37</sup> Staff’s Response at ¶¶ 15-17; Stipulating Parties Response at 1:15-17. *Accord* RCW 42.30.140; RCW 80.01.030; RCW 81.53.261.

<sup>38</sup> Emch, TR 34:20 – 35:1 (“[W]e are one of the parties to the agreement, we would at least want to be involved in that discussion.”); Corrected Stipulated Motion at 11 (blank, unsigned page labeled “Section 13 – Waiver of Hearing by Respondent”).

<sup>39</sup> *Supra* ¶ 12.

<sup>40</sup> WAC 480-07-380(1)(a); WAC 480-07-900(1) (concerning commission “business under Chapter 42.30 RCW, the Open Public Meetings Act.”). *See also Johnson v. Wash. State Conserv. Comm’n*, 16 Wn. App. 2d 265, 291 (2021) (“Therefore, reading the OPMA and APA harmoniously, there is no conflict between the statutes and the APA must be applied.”).

provides a distinction that notes that nothing requires the parties to initiate a contested adjudication as to cost,<sup>41</sup> the existence of the right to a hearing does not nullify the fact that the parties may avoid that step and directly enter into an agreement for the apportionment of the cost of installation and maintenance, and proceed in a manner that resembles the handling of an application. BNSF and the City, the instigators of this storied adjudicative process appear to have reached consensus as to cost apportionment and the requirements of public safety.<sup>42</sup> As described in statute, there appears to be “agreement by all parties to waive hearing,” such that we “shall forthwith enter its order.”<sup>43</sup>

### FINDINGS AND CONCLUSIONS

- 27 (1) The Commission is an agency of the state of Washington having jurisdiction over public railroad-highway grade crossings within the state of Washington.
- 28 (2) The SR-9 grade crossing, identified as USDOT 065838N, is a public highway-rail grade crossing within the state of Washington.
- 29 (3) RCW 81.53.261 requires that the Commission grant approval prior to modifying a public railroad-highway grade crossing within the state of Washington. *See also* WAC 480-62-150.
- 30 (4) The parties have filed a Corrected Amended Petition which updates the petition with more current information. It is appropriate to grant the motion for leave such that the amended petition supersedes the previously filed one.
- 31 (5) Staff moved for leave to respond, which should be granted as a welcomed suggestion. Staff recommends that BNSF’s August 14 notice be construed as a motion to withdraw, which should then be granted. The parties do not object or offer their own analysis. However, we do not find it appropriate to grant the motion to withdraw because the settlement has not been provided for review, as the motion to withdraw process would require.
- 32 (6) After examining the Correct Amended Petition filed by BNSF and the City on August 26, 2025, we find the space in which a party can waive their request to hearing is blank and unsigned. To harmonize the record with the apparent intent

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<sup>41</sup> *Supra* ¶ 10.

<sup>42</sup> *See* Roberson, TR 33:22 – 34:5.

<sup>43</sup> RCW 81.56.261.

of the Parties, we find it appropriate to require a corrected filing which fills out Section 13.

- 33 (7) This matter is (or will be) non-justiciable because it is unambiguously moot upon filing of the completed Section 13. The Parties have agreed and represented that they do not wish a hearing, and that this is not a contested dispute.<sup>44</sup> Transfer to an Open Meeting is appropriate at this time, subject to the filing of the corrected petition.
- 34 (8) Using a liberal construction of regulations so as to achieve intent of the parties, we *sua sponte* interpret the parties as having stipulated to a motion to dismiss. If proper waiver is filed prior to the effective date of this Order, it is appropriate for Staff to schedule this undisputed matter for resolution through the Open Meeting process. If such a waiver is not timely filed, it would be appropriate for Staff to notice this ALJ of the status of this matter and a recommendation of resolution.

## ORDER

### THE COMMISSION ORDERS:

- 35 (1) The Stipulated Parties Motion to Amend is granted
- 36 (2) Staff's motion for leave to file a response is granted.
- 37 (3) The Commission construes the City and BNSF's filings as a stipulated motion to dismiss for lack of justiciability and grants the motion, provided that BNSF confirm their intent by filing a corrected filing in which the waiver of hearing at Section 13 is completed.
- 38 (4) If the filing referred to in (3) is made prior to the effective date of this Order, Staff may set the matter for open meeting. If the filing referred to in (3) is not made by the effective date of this Order, then Parties will file a notice in the docket to so explain.

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<sup>44</sup> We note that RCW 81.53.261 provides a waiver provision separate from the one provided for by the Administrative Procedure Act at RCW 34.05.050.

DATED at Lacey, Washington, and effective February 2, 2026.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

*/s/ Bijan Hughes* \_\_\_\_\_

BIJAN HUGHES

Administrative Law Judge

### NOTICE TO PARTIES

This is an initial order. The action proposed in this initial order is not yet effective. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this initial order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2)(a) provides that any party to this proceeding has 20 days after the entry of this initial order to file a petition for administrative review (Petition). Section (2)(b) of the rule identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-825(2)(c) states that any party may file an answer (Answer) to a Petition within 10 days after service of the petition.

WAC 480-07-830 provides that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will not accept answers to a petition to reopen unless the Commission requests answers by written notice.

RCW 80.01.060(3) provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

Any Petition or Response must be electronically filed through the Commission's web portal as required by WAC 480-07-140(5).