

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET TR-150284
TRANSPORTATION COMMISSION,)	
)	ORDER 03
Complainant,)	
)	ORDER CLARIFYING ORDER 02,
v.)	REQUIRING UNQUALIFIED
)	ACCEPTANCE OR REJECTION OF
)	COMMISSION CONDITIONS ON
BNSF RAILWAY COMPANY,)	APPROVAL OF SETTLEMENT
)	AGREEMENT, AND MODIFYING
)	PENALTY PAYMENT DUE DATE
Respondent.)	
.....)	

BACKGROUND

- 1 On March 19, 2015, the Washington Utilities and Transportation Commission (Commission) through its regulatory Staff (Staff) filed a complaint against BNSF Railway Company (BNSF or Company). The complaint alleges that BNSF failed to report 14 hazardous material releases in the manner required by WAC 480-62-310, resulting in 700 violations of that rule.
- 2 On August 27, 2015, BNSF and Staff filed a Settlement Agreement (Settlement) that the parties represented would resolve all issues in this docket. The Commission conducted a hearing on the Settlement, and on December 7, 2015, entered Order 02, Final Order Approving Settlement Agreement with Conditions (Order 02). Order 02 required the parties within five business days either to accept the conditions in Order 02 or reject them and proceed with adjudication of the complaint.
- 3 On December 14, 2015, Staff filed a letter accepting the conditions. BNSF filed a pleading captioned, “Respondent BNSF Railway Company’s Acceptance of Final Order Approving Settlement Agreement” (BNSF Acceptance). BNSF purports to accept the conditions in Order 02 “subject to the understanding that [the \$71,700 penalty] would be refunded to BNSF if the Commission subsequently determines that BNSF has not met the conditions applicable to BNSF as described in Order 02 and the matter proceeded to

adjudication,”¹ and “further subject to the understanding that if a mutually agreeable stipulation [with Staff] cannot be achieved or is not accepted by the Commission, then the Settlement and any stipulation prepared pursuant to the Settlement ‘shall be null and void, with no binding effect on the parties and with no precedential or preclusive effect on the Company or Staff.’”²

DISCUSSION

4 Order 02 is a final order that resolves the issues presented in the complaint by adopting the requirements to which the parties agreed in the Settlement along with additional conditions. Once the parties accept the additional conditions, the requirements in Order 02 are binding on the parties unless the Commission subsequently modifies that order. A party may file a motion for clarification of the terms of a final order for the purpose of enhancing compliance with the order.³ BNSF did not file such a petition, but we construe the BNSF Acceptance as a request for clarification of Order 02.⁴

5 BNSF effectively seeks clarification of two issues.⁵ First, BNSF asks for confirmation of its understanding that the Commission would refund the \$71,700 penalty if the Commission later determines that BNSF has not complied with the conditions in Order 02. The Company’s understanding is not consistent with our intent. The \$71,700 assessment to which the parties agreed and that the Commission adopted penalizes the Company for violations of WAC 480-62-310 and is an incentive for BNSF to comply with the rule in the future. That penalty is not contingent on BNSF’s compliance with the other conditions in the order. If the Company accepts the conditions in Order 02, BNSF must pay the full \$71,700 by the payment due date to comply with the order, and the Commission will retain those funds regardless of the extent to which the Company complies with the other conditions in the order. A motion for clarification does not toll

¹ BNSF Acceptance ¶ 3.1.

² *Id.* ¶ 3.2.

³ WAC 480-07-835(1).

⁴ *See* WAC 480-07-395(4).

⁵ BNSF raises a third issue of the extent to which it must comply with the condition that Staff negotiate a memorandum of understanding or other agreement with the Washington State Emergency Operations Center (EOC). We clarify that BNSF has no compliance obligation with respect to this condition other than to report to the Commission with Staff on the feasibility and desirability of having the Company submit reports directly to Staff in addition to the EOC.

the time for compliance with a final order,⁶ but we modify Order 02 to require BNSF to pay the penalty by December 30, 2015, if the Company accepts the conditions in that order.

- 6 BNSF's second issue is its understanding that the Settlement and additional conditions in Order 02 would be void or otherwise no longer effective if the parties are unable to agree to a stipulation on how the Company will comply with WAC 480-62-310 in the future. That understanding, too, is incorrect. This condition, like the assessed penalty, is an independent requirement that the Commission adopted to resolve the issues in this proceeding – specifically to minimize the likelihood that BNSF and Staff will once again be at odds over what the Company must report to comply with the rule.
- 7 If BNSF accepts the conditions in Order 02 and the parties are unable to reach agreement on a stipulation, each party must file a statement of its position on the issues described in paragraph 48 of Order 02. The Commission would then determine whether to resolve the disputed issues based on the written position statements or to conduct additional proceedings. The inability of the parties to reach a stipulation, however, would not result in any additional penalties assessed against BNSF arising from Order 02 and would have no impact on the parties' obligations to comply with the Order's other requirements.
- 8 The order directs the parties to indicate whether they accept the conditions the Commission added to the Settlement. We continue to adhere to that requirement. Each party must inform the Commission whether that party elects to accept the conditions as stated in Order 02 or to reject those conditions. Staff has provided its unqualified election. As clarified in this order, BNSF either must accept or reject the conditions in Order 02. If BNSF does not accept the conditions as stated in Order 02, without qualification, then the Company must notify the Commission and Staff, and the Commission will establish a procedural schedule for adjudication of the complaint.

ORDER

9 THE COMMISSION ORDERS:

- 10 (1) BNSF Railway Company must file a letter by December 22, 2015, electing either to accept the conditions in Order 02, without qualification, or to reject those conditions and to proceed with adjudication of the complaint.

⁶ WAC 480-07-835(4).

- 11 (2) If BNSF Railway Company accepts the conditions in Order 02, BNSF Railway Company must pay the penalty of \$71,700 the Commission assessed in paragraph 47 of Order 02 by December 30, 2015.
- 12 (3) If BNSF Railway Company accepts the conditions in Order 02 and the parties are unable to agree on the stipulation required in paragraph 48 of Order 02, each party must file a statement of its position on the issues described in that paragraph on February 1, 2016, the date the stipulation is due. The Commission will then determine whether to resolve the disputed issues based on the written position statements or to conduct additional proceedings.

DATED at Olympia, Washington and effective December 18, 2015.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

ANN E. RENDAHL, Commissioner