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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3	BNSF RAILWAY COMPANY,)	
)	
4	Petitioner,)	
	vs.)	DOCKET NO. TR-090121
5)	Volume II
	SNOHOMISH COUNTY,)	Pages 39 - 59
6)	
	Respondent.)	
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9 A prehearing conference in the above matter
10 was held on March 20, 2009, at 10:31 a.m., at 1300
11 South Evergreen Park Drive Southwest, Olympia,
12 Washington, before Administrative Law Judge ADAM E.
13 TOREM (via bridge line.)

14 The parties were present as follows:

15 BNSF RAILWAY COMPANY, by BRADLEY P. SCARP and
16 KELSEY E. ENDRES (via bridge line), Attorneys at Law,
17 Montgomery, Scarp, MacDougall, 1218 Third Avenue, Suite
2700, Seattle, Washington 98101; telephone, (206)
625-1801.

18 SNOHOMISH COUNTY, by JUSTIN W. KASTING,
19 Deputy Prosecuting Attorney, 3000 Rockefeller Avenue,
M/S 504, Everett, Washington 98201; telephone, (425)
388-6337.

20 WASHINGTON UTILITIES AND TRANSPORTATION
21 COMMISSION, by JONATHAN THOMPSON, Assistant Attorney
22 General, 1400 South Evergreen Park Drive Southwest,
Post Office Box 40128, Olympia, Washington 98504;
23 telephone, (360) 664-1225.

24 LYNN F. LOGEN, Intervenor, by LYNN F. LOGEN
(via bridge line) (pro se), 15017 Southeast 43rd Place,
Bellevue, Washington 98006; telephone, (425) 641-1692.

25 Kathryn T. Wilson, CCR, Court Reporter

0002

1 P R O C E E D I N G S

2 JUDGE TOREM: It's a little bit after 10:30
3 in the morning on March 20th, 2009. This is docket
4 TR-090121. This is Administrative Law Judge Adam
5 Torem, and I'm appearing on the bridge line today
6 having gotten back from Korea yesterday afternoon a day
7 early, so I was able to step in and not have Judge
8 Rendahl make a decision regarding the issue before us.

9 We are having a conference today at the
10 request of Mr. Lynn Logen, who filed a motion for a
11 continuance. I think we are probably going to use this
12 today as the status conference we would have had next
13 week and go ahead and strike that unless there is
14 further business to take up next week. At this point,
15 I want to go around and take appearances, and we will
16 start with those in the conference room in Olympia;
17 Mr. Thompson?

18 MR. THOMPSON: This is Jonathan Thompson,
19 assistant attorney general, representing the Commission
20 staff.

21 JUDGE TOREM: I understand that Snohomish
22 County is in the room.

23 MR. KASTING: This is Justin Kasting, deputy
24 prosecuting attorney representing Snohomish County.

25 JUDGE TOREM: Excellent. I believe your

0003

1 contact information is the same as your colleague who
2 made a full appearance the last time at our prehearing
3 conference?

4 MR. KASTING: That is correct.

5 JUDGE TOREM: Let's turn to the bridge line.
6 I understand, Mr. Logen, you are on the bridge line?

7 MR. LOGEN: That is correct. This is Lynn
8 Logen, L-y-n-n, L-o-g-e-n.

9 JUDGE TOREM: I believe for BNSF, Mr. Scarp?

10 MR. SCARP: This is Bradley Scarp for BNSF
11 Railway Company, and I don't know if Ms. Endres is also
12 on the line --

13 MS. ENDRES: Yes.

14 MR. SCARP: Kelsey Endres is on the line, and
15 our contact information is the same as at the last
16 hearing.

17 JUDGE TOREM: We went around before we went
18 on the record, and I didn't hear any other business
19 that needed to be taken up, so Mr. Logen, please
20 restate again the reason for the motion for continuance
21 that's in your letter so everyone is on the same page
22 this morning as well as give us any further elaboration
23 you think is necessary.

24 MR. LOGEN: Thank you. First off, I want to
25 state that the last sentence in my petition, the

0004

1 unforeseen responsibilities, have been shifted as of
2 this morning, so they no longer prevent me from making
3 the March 30 and 31 hearing.

4 However, the receipt of information to my
5 data request has taken some time. I issued data
6 requests on February 24th, and the day after I returned
7 back to the state, I received replies ten days later,
8 but then I received supplemental replies on March 11th
9 and March 17th. On some of the information I received
10 on March 11th, on March 13th, I issued additional data
11 requests that replies on those wouldn't be due until
12 March 27th, which doesn't really give me time to
13 consider them and make any decisions.

14 Also in the information in the data request,
15 there was an indication that Burlington Northern was
16 interested in settling, so I would like to explore that
17 since the Commission generally encourages settlement.

18 JUDGE TOREM: Thank you, Mr. Logen.

19 MR. LOGEN: One additional comment; there was
20 also information sent to the Commission that was not
21 posted on our Web site, comments from the public, which
22 I believe able to receive through an additional data
23 request, and that was sent back to me promptly.

24 JUDGE TOREM: Do you still think the hearing
25 needs to be pushed away from March 30th to 31st? Are

0005

1 you still making that request to continue?

2 MR. LOGEN: Yes, I am.

3 JUDGE TOREM: Let me hear first from
4 Mr. Scarp or Ms. Endres from BNSF.

5 MR. SCARP: Thank you, Judge Torem. I'm glad
6 that we cleared up the unforeseen responsibilities.
7 With regard to the data requests, and if I'm not
8 completely accurate, Ms. Endres has probably a finger
9 closer to the pulse of exactly what the responses are,
10 but quite simply, Mr. Logen has sent us quite a
11 comprehensive set of data requests on a number of the
12 issues which, I would suggest are not going to be
13 relevant to the determination of the public crossing
14 closure.

15 That said, we have gone out of our way to
16 obtain and provide data and responses, and we
17 supplemented those responses with documents as we see
18 or obligations, but I don't really see how some of
19 these issues are going to be material to the
20 Commission's determination on the public closure. So I
21 can't see how he has been prejudiced in any way, shape,
22 or form because we've gone out of our way to do this.

23 I would also note that we have witnesses
24 lined up and that we have been planning toward this
25 date, and our witnesses are available, and I loathe to

0006

1 try to recreate this without an absolutely compelling
2 reason, which from our side we haven't heard, but
3 that's not our determination. I also note that the
4 public comment session has been scheduled and notices
5 for that have gone out.

6 To sum up, Your Honor, I heard a vague
7 assertion that some of the responses, the supplemental
8 responses have come in late, but I haven't heard
9 anything that has been directed to the issues that will
10 be in front of you to determine the closure.

11 JUDGE TOREM: Thank you, Mr. Scarp. I want
12 to come back to some of that in a moment. I want to
13 hear first from Mr. Kasting, and then, Mr. Thompson,
14 I'll have you wrap up.

15 MR. KASTING: The County concurs with
16 everything Mr. Scarp has said and doesn't have a whole
17 lot to add. The County's position on the closure is
18 clearly articulated in County Counsel Motion 09-032,
19 which is included as Exhibit EE in the County's
20 response to Mr. Logen's data request. The County would
21 oppose the continuance because it would like to see the
22 construction of the railroad terminal proceed as
23 expeditiously as possible, and so again, the County
24 would agree with everything that Mr. Scarp said as
25 well.

0007

1 JUDGE TOREM: Mr. Thompson?

2 MR. SCARP: Excuse me, Judge Torem. In case
3 I didn't make it absolutely clear, BNSF clearly opposes
4 the motion for continuance.

5 JUDGE TOREM: Mr. Thompson?

6 MR. THOMPSON: For Staff's part, I would only
7 add that we have scheduled the public comment hearing,
8 as Mr. Scarp alluded to, for the evening of Monday the
9 30th, and I think something like 68 notices have been
10 mailed out to people in the area of the crossing and or
11 people who have filed comments already with the
12 Commission, and I think also the Commission sent out a
13 press release to notify people of the public comment
14 hearing.

15 So in any event, I think the public comment
16 hearing needs to remain on that date because you can't
17 really undo the notice. Given that, we certainly would
18 like to maintain the efficiency of having the hearing
19 on the same date. It makes it difficult to try to
20 schedule a different date for the adjudicative portion
21 of the hearing.

22 I think the issue boils down to this question
23 of what argument Mr. Logen feels he needs to make with
24 the outstanding information. Maybe BNSF could commit
25 to provide a quick response on whatever it is, and

0008

1 maybe we could explore a little more what the argument
2 is and what information is required .

3 MS. ENDRES: Brad, let me know if you want to
4 take this one, but as far as the data requests that
5 Mr. Logen has referred to with the responses that came
6 in relatively recently, and John's request for a little
7 bit more information, as far as I understand,
8 Mr. Logen, and correct me if I'm wrong, is sort of
9 looking to get more information related to ownership of
10 the crossing. BNSF recently sent Mr. Logen documents
11 that do show that BNSF does own the railway
12 right-of-way. I don't think that those are at issue in
13 this hearing, as well as some of the merits of the
14 siding track project itself in terms of archeology
15 studies or wetland issues. I'm not sure exactly where
16 Mr. Logen was going with that, and maybe we will
17 address those issues a little bit more if we are doing
18 our status conference in limiting the scope of some of
19 these issues, but as far as I understand from the data
20 requests, that's really where he's trying to go, and I
21 don't think that those are going to be ultimately in
22 the scope of the issues decided at the hearing.

23 JUDGE TOREM: What I'm hearing generally,
24 Mr. Logen, is all the other parties are opposed to the
25 continuance, but the conflict that would have made you

0009

1 unavailable to play your role as a party has been
2 removed; is that correct, sir?

3 MR. LOGEN: That is correct.

4 JUDGE TOREM: The next question really is the
5 data requests and you getting information in a timely
6 fashion so you can analyze it and be prepared to, as it
7 proves relevant, get that information before me through
8 an appropriate witness or exhibits a week from Monday,
9 if that's the day we go forward. So I'm going to ask
10 Mr. Scarp and Ms. Endres, what outstanding data
11 requests do you have from Mr. Logen at this time?

12 MR. SCARP: I'm going to defer to Ms. Endres.

13 MS. ENDRES: We have three outstanding data
14 requests. One pertains to an option mentioned in an
15 e-mail from Megan McIntyre that really relates to the
16 procedural construction of the siding track project.
17 One is Mr. Logen's request for what options may be
18 available in terms of settlement between a private
19 crossing or some other issue, which I think those
20 discussions can certainly proceed regardless of when
21 the hearing is scheduled.

22 The third data request asks for any studies
23 of the impact of the siding construction and
24 archeological sites, and of course it will be up to
25 your ruling on the scope of the issues, but when we are

0010

1 balancing public safety versus convenience and
2 necessity, the merits of the siding track, SEPA and
3 whatnot, BNSF's position is that these three data
4 requests do not affect the issues that will be explored
5 at the hearing next week or whenever that will be.

6 MR. SCARP: Judge Torem, could Ms. Endres
7 tell us when those data requests were received by us
8 from Mr. Logen?

9 MS. ENDRES: These data requests were sent to
10 us on March 13th.

11 JUDGE TOREM: So March 13th, and they would
12 be due out in a response on Monday?

13 MS. ENDRES: I believe it would be the
14 Friday. If I remember the procedural rules, I think
15 it's ten business days.

16 JUDGE TOREM: So that would be the 27th then.
17 What is the soonest you could have those responses
18 ready?

19 MS. ENDRES: We are just waiting on final
20 feedback from our client, so as soon as we get that,
21 they should be ready to go out.

22 JUDGE TOREM: If you can see if your client
23 can get their final feedback in by noon on Monday, I
24 think that would allow us to get these responses, if at
25 all possible, either one or all three of them, back

0011

1 from BNSF to Mr. Logen on Monday afternoon or Tuesday
2 morning. That way, as you suggested, perhaps we could
3 at that point use Tuesday afternoon's time. We are
4 scheduled at 2:30 for a status conference to talk about
5 the issues and determine at that point which, if any,
6 of these various issues go beyond public safety, which
7 is the statutory requirement for the Commission to
8 judge whether the petition for closure of the crossing
9 should be granted or not. We'll see from others
10 Mr. Logen is trying to bring at the hearing as a focus
11 or which he's trying to simply get a bigger picture for
12 his own purposes so he knows how to approach this, and
13 then Tuesday afternoon, we can have those discussions
14 and appropriately as necessary limit and focus the
15 hearing to those issues that are available within the
16 Commission's jurisdiction to rule upon at a hearing of
17 this sort, and if there are other issues that can be
18 taken up in some other way, whether it's through a
19 county land use process or something that would be
20 between Mr. Logen and the state Department of
21 Transportation on a state SEPA process, we might be
22 able to better direct him, whether from within the
23 other parties as a suggestion or with my ruling on what
24 the scope of the hearing should be. We can take care
25 of that on Tuesday. So I guess the question was, do

0012

1 you think that you can get a response to him by Monday
2 afternoon on the outstanding data requests?

3 MS. ENDRES: We will do everything in our
4 power to do so.

5 JUDGE TOREM: If you get those responses on
6 Monday or Tuesday morning, Mr. Logen, do you think that
7 will give you enough time to prepare for hearing on
8 March 30th?

9 MR. LOGEN: That would help a lot, yes, and I
10 think I probably could.

11 JUDGE TOREM: The one thing that it doesn't
12 solve is your request to get some time for settlement
13 discussions with the Railway, and it sounded like from
14 what Ms. Endres described, the issue is this private
15 crossing and how you might be able to negotiate its
16 terms. I can appreciate your wanting to have that done
17 in the context of a hearing, and whether you appreciate
18 or not, there may be some issues that the Commission
19 has jurisdiction over now or could influence now which
20 might no longer exist if the crossing is already closed
21 or a ruling has been made for us to influence BNSF and
22 its position on private crossings, so I can understand
23 wanting to have those negotiations while this docket is
24 still pending. Have you made any individual attempts
25 to schedule something between now and the hearing dates

0013

1 with BNSF to talk about what terms might be amenable to
2 both of you for private crossing agreement?

3 MR. LOGEN: I called Ms. Endres and asked
4 some general questions, and they requested I put it in
5 the form of a data request.

6 JUDGE TOREM: So, Ms. Endres, it sounds as
7 though one of the responses will be as to what avenues
8 might be available for a private crossing for
9 Mr. Logen?

10 MS. ENDRES: That's the second data request,
11 yes.

12 JUDGE TOREM: What I'm hoping is that
13 whatever the response is, and if that comes out before
14 next week on Tuesday afternoon, that if we keep this
15 all on schedule to hold the hearing on March 30th and
16 31st, which from everything I've heard this morning is
17 my inclination, that somewhere between now and then,
18 there would be some room for settlement discussions
19 among the parties.

20 If there is no room to schedule settlement
21 negotiations between now and March 30th, what I would
22 encourage is that the parties plan to hold the hearing
23 on March 30th and if necessary, carry over to the
24 morning of the 31st, but even when the hearing itself
25 closes on Tuesday that the parties stick around that

0014

1 are interested in a private crossing agreement and have
2 those negotiations with the remainder of Tuesday while
3 everybody is still there and the issues have been
4 freshly testified to that day or the day before.

5 Certainly while I take the case under
6 advisement after the 31st and wait to have final briefs
7 sent in, there is no reason the parties can't continue
8 negotiations and submit a proposed settlement after the
9 fact and even notify me that they want me to hold off
10 on an opinion until the settlement they are negotiating
11 is wrapped up in it. But the testimony and the
12 hearings, as Mr. Scarp pointed out, I think the fact
13 that the witnesses have been scheduled is having
14 efficiencies there as well as, Mr. Thompson pointed
15 out, having the public comment hearing schedule and the
16 rest of the public coming to give their views on Monday
17 are very good reasons to keep the hearing scheduled as
18 it is, and that second point I make because the public
19 quite often will attend some or all of the hearing
20 during the day prior to making their comments in the
21 evening, so I think some of the people that will come
22 only for public comment, they will be confused if we
23 give them another date.

24 So for those reasons, and because I do think
25 the other reasons given for the continuance, Mr. Logen,

0015

1 I think those can be resolved with a faster response to
2 data requests as pledged by BNSF today, we can take
3 care of this and satisfy your concerns, I'm going to
4 deny the request for continuance, and we will continue
5 as scheduled, but despite what I said earlier, we are
6 not going to strike Tuesday afternoon's status
7 conference. You don't need to make the drive down on
8 Tuesday, Mr. Kasting. I apologize that wasn't directly
9 communicated to you today to save some mileage.

10 MR. KASTING: It was communicated to us. It
11 was important for us to be down here.

12 JUDGE TOREM: With that, we will go forward
13 with the hearing as scheduled and we will go forward
14 with the status conference next week. To sum up, BNSF
15 is going to do its best to respond to your data
16 requests, Mr. Logen, ahead of our hearing on Tuesday
17 afternoon so that you will have all your data requests
18 completed. If there are supplemental responses, we
19 continue to ask people to file those. Those may even
20 be handed to you the day of the hearing, depending on
21 when they come in to BNSF. That's sort of standard
22 practice.

23 We are going to hear from everyone on Tuesday
24 regarding scope of the issues and anything else
25 outstanding, and if it's possible, I hope that,

0016

1 Ms. Endres, you and Mr. Logen can schedule some time to
2 meet ahead of the hearing and discuss potential issues
3 with the private crossing agreement, if that is
4 possible for both sides to negotiate. If I know the
5 terms of that at the hearing, that makes things a lot
6 easier, and if it comes in afterwards, it could still
7 be accommodated. Mr. Logen, do you have any questions?

8 MR. LOGEN: No, thank you, Judge.

9 JUDGE TOREM: Mr. Kasting?

10 MR. KASTING: Nothing. Thank you, Judge
11 Torem.

12 MS. ENDRES: I do have one brief question.
13 If BNSF and Mr. Logen do come to some sort of
14 settlement agreement, whether or not that involves a
15 private crossing or some other arrangement, I know
16 there was some question that we had, and we had
17 e-mailed Mr. Thompson about when a hearing is required,
18 and if an intervenor is opposing a petition, if we did
19 come to a settlement agreement with Mr. Logen, would
20 the hearing still need to proceed because the
21 Commission receives public comment against closure to
22 make a record?

23 JUDGE TOREM: My understanding, and
24 Mr. Thompson, you can chime in with the Commission
25 staff's understanding, is at this point, we do have to

0017

1 hold the public comment hearing. That would be
2 required because we do have comments coming in and they
3 showed opposition to the proposed closing, so we do
4 have to hold that portion of the hearing.

5 As far as the evidentiary hearing, if all the
6 parties were on one side, it wouldn't make for much of
7 a hearing, and we wouldn't need to make a record as to
8 the rest of it. You may still wish to come and make a
9 pro forma record on which to counter anything that
10 comes in from the public, so you may want to pick and
11 choose from the Railway's or County's perspective to
12 submit your witnesses to a brief direct examination,
13 but if you have settled with Mr. Logen, there wouldn't
14 necessarily be any cross-examination, except for
15 briefly from Commission staff, so it would be more of a
16 streamlined hearing.

17 If you wanted to waive the ability to put on
18 any witnesses, then certainly we could strike that
19 hearing, but my understanding of the statute requires
20 that we still hold a public comment hearing, and it is
21 scheduled Monday evening the 30th. Mr. Thompson, what
22 is Commission staff's position on that?

23 MR. THOMPSON: I would agree we need to hold
24 the public comment hearing, if for no other reason than
25 it is already advertised we were going have one, and

0018

1 also, I think when there is a settlement agreement,
2 there has to be some sort of consideration of the
3 settlement once an adjudication has been started, so
4 that might be the opportunity for the proponents of the
5 settlement to just present a panel of people to speak
6 to the settlement and why it's in the public interest
7 and why the crossing should be closed in just general
8 terms, as you say.

9 MR. SCARP: I don't want to get too far down
10 the road. We will communicate with our client. This
11 process is ongoing, by the way, settlement discussion,
12 but going forward on that, in the event that there is a
13 resolution with Mr. Logen, would it be possible to
14 submit direct testimony, perhaps in writing, in lieu of
15 a hearing?

16 JUDGE TOREM: That would certainly be
17 possible, Mr. Scarp, and I will let you wait until
18 Tuesday afternoon to tell me whether that's what you
19 want to do or not. Lots of things could happen between
20 now and Tuesday afternoon, I'm sure, to make progress
21 along these lines.

22 What I was going to suggest is that's the
23 opportunity scheduled right now for a hearing on the
24 merits. If the main merits for holding that hearing
25 was the petition for intervention that was granted to

0019

1 Mr. Logen to oppose the crossing and the parties are
2 able to resolve that opposition, then there would be no
3 need for the evidentiary hearing.

4 As Mr. Thompson pointed out, there has to be
5 some process on the settlement itself, and if the
6 settlement hearing were not ripe to be conducted on
7 March 30th or 31st simply because conceptually, the
8 parties had agreed to it but the form of the settlement
9 had yet to be turned out or various supporting exhibits
10 needed to be created, we could schedule another
11 settlement hearing in April, and the public comment
12 would already have been taken on March 30th, and the
13 settlement hearing could be held with a small panel of
14 witnesses, whether back in the community so they had an
15 opportunity to attend, or whether that be held in
16 Olympia, but the settlement could be coming into the
17 Commission with the basis of the sworn testimony.

18 And Mr. Scarp, if your witnesses would need
19 to supply testimony in support of a settlement of the
20 case had to appear by telephone, I think we could work
21 that out as well. So I want to give the parties as
22 much flexibility as possible to settle their issues,
23 and if the Commission needs to make a ruling on the
24 crossing closure, the Commission can do that, but I
25 want to make sure we go forward with process, and the

0020

1 dates we've agreed to will stay in place now. You will
2 have to tell me next week where we are with settlement
3 and what's probable, and then on March 30th, tell me if
4 we are going to have real witnesses or just a pro forma
5 here's the settlement and a small panel or something
6 else that we can do. Mr. Scarp, does that answer the
7 question of how I'm looking at it now?

8 MR. SCARP: I believe it does. Thank you.

9 JUDGE TOREM: In sum, we will have a status
10 conference next Tuesday, the 24th. It will be a
11 telephone conference except I will be in Olympia. We
12 will have the hearing itself on March 30th and 31st
13 with the public comment hearing as currently scheduled
14 on the evening of March 30th. Mr. Logen, are there any
15 other questions you have?

16 MR. LOGEN: None, thank you.

17 JUDGE TOREM: Any other parties, any
18 questions?

19 MR. SCARP: I don't have any, Judge Torem.

20 JUDGE TOREM: Ms. Endres, any questions as to
21 the data request issue?

22 MS. ENDRES: No, Your Honor.

23 JUDGE TOREM: Mr. Kasting?

24 MR. KASTING: No.

25 JUDGE TOREM: I will hear from you all on

0021

1 Tuesday afternoon. Good luck getting those data
2 requests sent out, and Mr. Logen, do you foresee any
3 other data requests?

4 MR. LOGEN: Not at this time I don't.

5 JUDGE TOREM: If you do, please make me and
6 the rest of the parties aware Tuesday afternoon, but I
7 think regardless, we are going to go forward on the
8 hearing as scheduled. Any other questions? Then a
9 little after 11 o'clock, we are off the record. Thank
10 you all very much.

11 (Prehearing adjourned at 11:03 a.m.)

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