



October 11, 2006

Carole Washburn  
Executive Secretary  
Washington Utilities & Transportation Committee  
1300 South Evergreen Park Drive S.W.  
Olympia, WA 98504-7250

Re: Docket Nos. TR-04664 and TR-050967

Dear Ms. Washburn:

Enclosed are an original and one copy of the City of Kennewick's Motion to Strike BNSF Witnesses and Affidavit of John Ziobro. A copy of the document was e-mailed to all parties of record.

Very truly yours,

A handwritten signature in black ink, appearing to read "John S. Ziobro". The signature is fluid and cursive, written over a light blue horizontal line.

JOHN S. ZIOBRO  
City Attorney

JSZ/bl

Enclosures

CITY ATTORNEY'S OFFICE



1 Junction. (Docket No. TR 040664). On June 27, 2005, the City of Kennewick filed its at-  
2 grade crossing petition to extend Center Parkway over the Port of Benton Industrial  
3 branch west of Richland Junction. (Docket No. TR 050967). These two matters were  
4 ultimately consolidated and a Pre-Hearing Conference was set for January 9, 2006.  
5 Following that hearing, the Commission issued Appendix B, Procedural Schedule,  
6 attached herein as Exhibit 1. This appendix provided that informal discovery was to end  
7 on May 10, 2006.  
8

9 On May 31, 2006, the City issued to BNSF, among other parties, First Requests  
10 for Discovery. Among those items requested included Request No. 2:

- 11 2. Please list any potential witnesses, including experts, that may testify on  
12 behalf of Burlington Northern Santa Fe in this matter and the topics upon  
13 which they will testify.
- 14 3. Identify any evidence or expert opinions developed or relied upon by  
15 Burlington Northern Santa Fe which suggests the extension of Center  
Parkway to Tapteal and the associated railroad crossing are not necessary.

16 This request has not been answered. (Exhibit 2).

17 In preparation of the October 9 deadline to disclose witnesses and exhibits, an e-  
18 mail was sent to BNSF Railway's attorney asking for answers to discovery or a status  
19 report. (Exhibit 3).

20 On October 10, 2006, BNSF submitted its pre-hearing conference disclosures.  
21 That disclosure included the disclosure of two names, Richard T. Bartoskewitz, and  
22 Daniel MacDonald, who may replace Bartoskewitz if he is unavailable. This is the first  
23 disclosure of any name by BNSF. The hearing is set to begin on October 19, 2006.  
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### III. Argument

With the exception of BNSF, all parties who have disclosed witnesses have also provided pre-filed testimony of their witnesses. Under the Washington Court Rules, the Court has wide latitude to determine what sanctions are appropriate. *In Re: Estate of Fahnländer*, 81 Wn.App. 206, 209 (1996). The Commission should follow that authority. In so doing, it should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction. *Id.*

The aim of discovery rules is to “make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *Washington State Physicians Insurance Exchange Association v. Fisons Corporation*, 122 Wn.2d 299, 342 (1993). The availability of liberal discovery means that civil trials no longer need to be carried on in the dark. *Id.* No recourse for failing to produce discovery was sought by the City to date since it appeared no witnesses would be called by BNSF. However, a Motion to Compel Compliance with Discovery Rules is not a prerequisite to a sanctions’ motion. *Id.* at 345.

BNSF has put itself at a decisive advantage by failing to respond to discovery and thereby avoiding the requirement to submit pre-filed testimony. This places BNSF at an unfair advantage. In its Pre-Hearing Disclosure, BNSF indicates that its witnesses may testify. Again, BNSF has the advantage of waiting until it has heard all of the testimony before making this determination. This is a luxury that has not been afforded to the remaining parties.

1 As the Commission considers potential remedies for this situation, it should be  
2 apparent that the overall importance of these witnesses is suspect. Therefore, striking them  
3 provides the most practical remedy. This matter has been pending for several months,  
4 holidays will soon be approaching, and to continue this hearing would most likely result in  
5 a hearing date after the first of the year. A continuance is a more drastic remedy than  
6 striking a witness who may or may not testify, but has not been disclosed.  
7

#### 8 IV. Conclusion

9 The direct testimony has been submitted in this matter. The bulk of the testimony  
10 that remains will be in the form of cross examination and possibly rebuttal testimony.  
11 BNSF Railway has not disclosed its witnesses as rebuttal witnesses. Rather, they have  
12 disclosed names after witnesses have already been requested by the City, and in essence,  
13 is reserving the right to call its witnesses if it is convenient. This unnecessarily forces the  
14 City into the game of blindman's bluff. The City, Union Pacific Railroad, and Tri-City &  
15 Olympia Railroad have met the burden of submitting prefiled testimony. A balancing of  
16 equities requires that BNSF participate in this hearing under the same circumstances as the  
17 remaining parties or be sanctioned for failing to comply with discovery and make timely  
18 disclosure of these witnesses. Accordingly, the City of Kennewick requests that BNSF  
19 witnesses be stricken.  
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22 Respectfully submitted this 11<sup>th</sup> day of October, 2006.

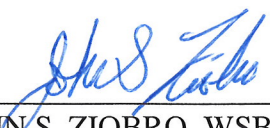
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JOHN S. ZIOBRO, WSBA 25991



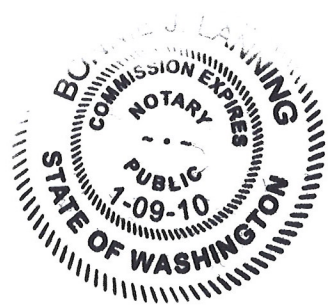
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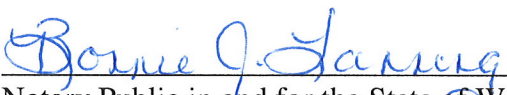
(3) Attached as Exhibit 2 is a true and correct copy of First Requests for Discovery dated May 31, 2006.

(4) Attached as Exhibit 3 is a true and correct copy of e-mail dated October 2, 2006, sent to BNSF Railway's attorney asking for answers to discovery or a status report.

  
\_\_\_\_\_  
JOHN S. ZIOBRO, WSBA #25991

SUBSCRIBED AND SWORN to before me this 11<sup>th</sup> day of October, 2006.



  
\_\_\_\_\_  
Notary Public in and for the State of Washington,  
residing at Pasco. My Commission Expires 1-9-10.



# Exhibit No. 1



**APPENDIX B**  
**PROCEDURAL SCHEDULE**  
**DOCKET NOS. TR-040664 & TR-050967**

EVENT	DATE
City of Kennewick files amended petition	January 13, 2006
Port of Benton files jurisdictional objections, if any	February 14, 2006
Responses, if any, to any objections	February 28, 2006
Informal discovery ends	May 10, 2006 <sup>2</sup>
City of Kennewick files testimony and exhibits	June 12, 2006
Port of Benton, Tri-City & Olympia RR and Commission Staff file testimony and exhibits	July 12, 2006
Dispositive motions, if any	August 14, 2006
Answers, if any, to any dispositive motions	August 28, 2006
Prehearing conference to mark exhibits and resolve objections and process issues	October 5, 2006 @ 1:30 p.m.
Hearing	October 12-13, 2006
Briefing or oral arguments	T/B/D

<sup>2</sup> The parties agreed that this date may be flexible to accommodate experts without impacting the filing date for the City's prefiled testimony.

# Exhibit No. 2



May 31, 2006

Kevin MacDougall  
Montgomery Scarp  
1218 3<sup>rd</sup> Avenue  
Seattle, WA 98101

Re: City of Kennewick v. Burlington Railway  
Nos. TR-040664 and TR-050967

Dear Mr. MacDougall:

Enclosed is an original and two copies of the City's First Requests for Discovery in the above-entitled matter. I can provide an e-mail copy if that is your preference.

Very truly yours,

JOHN S. ZIOBRO  
City Attorney

JSZ/bl

Enclosures

CITY ATTORNEY'S OFFICE

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

CITY OF KENNEWICK, )  
 ) DOCKET NO. TR-040664 and TR-050967  
v. Petitioner, )  
 )  
BURLINGTON RAILWAY, )  
 ) CITY'S FIRST REQUESTS FOR DISCOVERY  
Respondent. )  
 )  
..... )

TO: Burlington Northern Santa Fe and Kevin MacDougall, its attorney:

Pursuant to WAC 4807 and CR 26, the petitioner, City of Kennewick herewith submits the following discovery and requests for production to be answered severally and fully under oath within thirty (30) days from date of service of said request. In answering these requests, you are required to furnish such information as is available to you, not merely the information of which you have personal knowledge. This is intended to include any information in the possession of the agent or attorney or any investigator for the answering party.

These discovery requests are continuing in nature, and the City demands that any information coming into your possession or your counsel's that would change the answers in any way be promptly furnished to the City's counsel. In any event, no later than twenty (20) after receipt of such information.

DEFINITIONS

A Natural Adversary

As used herein, the terms "you," "your," or "yourself" refer to defendants, each of defendants' agents, representatives, and attorneys, and each person acting or purporting to act on defendants' behalf.

Representative

As used herein, the term "representative" means any and all agents, employees, servants, officers, directors, attorneys, or other persons acting or purporting to act on behalf of the person in question.

Person

As used herein, the term "person" means any natural individual in any capacity whatsoever or any entity or organization, including divisions, departments, and other units therein, and shall

include, but not be limited to, a public or private corporation, partnership, joint venture, voluntary or unincorporated association, organization, proprietorship, trust, estate, governmental agency, commission, bureau, or department.

### Document

As used herein, the term "document" means any medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, periodical, letter, memorandum (including any memorandum or report of a meeting or conversation), invoice, bill, order form, receipt, financial statement, accounting entry, diary, calendar, telex, telegram, cable, facsimile, report, record, contract, agreement, study, hand written note, draft working paper, chart, paper, print, laboratory record, drawing sketch, graph, index, list, tape, photograph, microfilm, data sheet or data processing card, digitized material, or any other written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, which is in your possession, custody, or control or which was, but is no longer, in your possession, custody or control.

### Communication

As used herein, the term "communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two or more persons.

### Identification

As used herein, the terms "identification," "identify," or "identity," when used in reference to (a) a natural individual, require you to state his or her full name and residential and business addresses; (b) a corporation, require you to state its full corporate name and any names under which it does business, its state of incorporation, the address of its principal place of business, and the addresses of all of its officers; (c) a business, require you to state the full name or style under which the business is conducted, its business address or addresses, the types of business in which it is engaged, the geographic areas in which it conducts those businesses, and the identity of the person or persons who own, operate, and control the business; (d) a document, require you to state the number of pages and the nature of the document (e.g., letter or memorandum), its title, its date, the name or names of its authors and recipients, and its present location and custodian; (e) a communication, require you, if any part of the communication was written, to identify the document or documents which refer to or evidence the communication, and, to the extent that the communication was not written, to identify the persons participating in the communication and to state the date, manner, place, and substance of the communication; (f) any event, occurrence, thing or subject not (a)-(e) above requires you to describe it so it can be identified by others and includes relevant times, dates, persons, equipment, documents, communications and things associated with it.

### Incident

As used herein the word "incident" refers to the acts or omissions which are the basis of this litigation. The date of the incident refers to every date on which a relevant act or omission by anyone occurred.

Or

As used herein, the word "or" appearing in an interrogatory should not be read so as to eliminate any part of the interrogatory, but, whenever applicable, it should have the same meaning as the word "and." For example, an interrogatory stating "support or refer" should be read as "support and refer" if an answer that does both can be made.

Masculine Convention

The use of the words, "he", "him", or "his" or words indicating the masculine, are intended to mean male and female. For instance the word "fireman" would include a male or female firefighter. If the interrogatory is directed toward the sex of an individual, the words "male" or "female" will be used.

INSTRUCTIONS

Identification of Documents

With respect to each interrogatory, in addition to supplying the information requested, you are to identify all documents that support, refer to, or evidence the subject matter of each interrogatory and your answer thereto.

If any or all documents identified herein are no longer in your possession, custody, control because of destruction, loss, or any other reason, then do the following with respect to each and every such document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original and a copy of the document; (d) state in as much detail as possible the contents of the document; and (e) state the manner and date of disposition of the document.

If you contend that you are entitled to withhold from production any or all documents identified herein on the basis of the attorney-client privilege, the work-product doctrine, or other ground, then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original and a copy of the document; (d) state the subject matter of the document; and (e) state the basis upon which you contend you are entitled to withhold the document from production.

Contention Interrogatories

When an interrogatory requires you to "state the basis of" a particular claim, contention, or allegation, state in your answer the identity of each and every communication and each and every legal theory that you think supports, refers to, or evidences such claim, contention, or allegation.

## DISCOVERY REQUESTS

1. Please identify yourself and identify each and every person with whom you consulted and relied upon as a source of information in connection with the preparation of your answers to these discovery requests and the corresponding request to which the person helped prepare the answer or were consulted or otherwise relied upon as a source of information.

ANSWER:

2. Please list any potential witnesses, including experts, that may testify on behalf of Burlington Northern Santa Fe in this matter and the topics upon which they will testify.

ANSWER:

3. Identify any evidence or expert opinions developed or relied upon by Burlington Northern Santa Fe which suggests the extension of Center Parkway to Tapteal and the associated railroad crossing are not necessary.

ANSWER:



**Request for Production No. 1.** From 2000 to present, provide copies of any documents, memos, studies, or correspondence related to Burlington Northern Santa Fe's analysis of alternatives for relocating the switching operation.

RESPONSE:

**Request for Production No. 2.** From 2000 to present, provide all correspondence (written or electronic), memos, and studies, regarding Burlington Northern Santa Fe's evaluation of plans to change, relocate or modify the switching operation for which the City seeks a crossing.

RESPONSE:

**Request for Production No. 3.** From 2000 to present, provide copies of all correspondence, memos, electronic mail and reports relating to Burlington Northern Santa Fe's refusal to grant trackage rights to Tri-City and Olympic Railroad to relocate existing switching operations to the Wallula Junction.

RESPONSE:

These interrogatories shall be deemed continuing so as to require supplemental answers if you or your attorneys obtain further information between the time answers are served and the time of trial.

DATED this 31<sup>st</sup> day of May, 2006.



# Exhibit No. 3

## John Ziobro

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**From:** John Ziobro  
**Sent:** Monday, October 02, 2006 11:13 AM  
**To:** kevin@montgomeryscarp.com; 'bljohnson@my180.net'  
**Subject:** WUTC proceedings - Discovery

Gentlemen,  
In looking at my files, I do not believe that I have received answers to discovery from either of you. Can you each provide me a status report? With a deadline in one week for exhibits, this could become an issue.  
John Ziobro