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

2 JUDGE MACE: Let's be on the record in Docket
3 TR-061442. This is the matter of Chelan County against
4 the Burlington Northern Santa Fe Railway Company. This
5 matter has to do with the request of Chelan County for
6 the Commission to authorize the alteration and
7 relocation of a highway-rail under-crossing at
8 Chumstick Highway in Chelan County. My name is
9 Theodora Mace. I'm the administrative law judge who
10 has been assigned to this case.

11 We are convened at the offices of the
12 Washington Utilities and Transportation Commission in
13 Olympia, Washington, on January 29th, 2007, at 9:30
14 a.m. I would like to begin the hearing today by taking
15 oral appearances from counsel, and because this is the
16 first prehearing, we need to have the long form of
17 appearance, which means I need to have your name, who
18 you represent, your address, phone, fax, and e-mail
19 address, so I would like to begin with you,
20 Mr. Chernak.

21 MR. CHERNAK: My name is Luis, L-u-i-s, N,
22 C-h-e-r-n-a-k. I'm with the Chelan County Prosecuting
23 Attorneys office and I represent Chelan County. My
24 address is 401 Washington Street, Fifth Floor, P.O.
25 Box 2596, Wenatchee, Washington, 98807. My telephone

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1 number is (509) 667-6202. My direct line is 667-6643,
2 and it probably would be best to call me at my direct
3 line. My fax number is (509) 667-6490, and I can
4 furnish my e-mail if you would like, too.

5 JUDGE MACE: Yes, please.

6 MR. CHERNAK: lou.chernak@co.chelan.wa.us.

7 JUDGE MACE: Mr. Scarp?

8 MR. SCARP: This is Bradley Scarp,
9 B-r-a-d-l-e-y, middle initial P, like in Patrick. Last
10 name is S-c-a-r-p. I'm with the firm of Montgomery,
11 Scarp, MacDougall, M-a-c-D-o-u-g-a-l-l. Our address is
12 1218 Third Avenue, 27th Floor. That's Seattle,
13 Washington, 98101. Our phone is area code
14 (206) 625-1801. Our fax is (206) 625-1807. My e-mail
15 address is brad@montgomeryscarp.com. We present BNSF
16 Railroad Company.

17 JUDGE MACE: Mr. Thompson?

18 MR. THOMPSON: This is Jonathan Thompson,
19 assistant attorney general, representing the Commission
20 staff. My address is 1400 South Evergreen Park Drive
21 Southwest, Olympia, Washington, 98504. My telephone
22 number is (360) 664-1225. My e-mail is
23 jthompso@wutc.wa.gov, and my fax number escapes me at
24 the moment. I think it's on the Commission's records,
25 however.

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1 JUDGE MACE: I'm sure we can find it. That
2 accomplishes the beginning parts of this prehearing
3 conference. No other parties have requested in writing
4 permission to participate. Is there anyone on the
5 bridge other than Mr. Chernak and Mr. Scarp who would
6 wish to enter an appearance today and participate in
7 this proceeding? Let the record reflect I hear no
8 response, and there is no one else in the hearing room.

9 The posture of this case is a little
10 different than some other cases regarding railroad
11 matters in that I believe there is a jurisdictional
12 issue that the parties want to address initially, so it
13 may be beneficial for us to discuss that a bit before
14 we go through with the rest of the prehearing
15 conference items. Am I correct in that, Mr. Scarp?

16 MR. SCARP: Well, that's correct from our
17 written response, Your Honor. It's the Railroad's
18 position that the Surface Transportation Board is the
19 only entity that can make a decision on shutting down
20 or moving an interstate railroad track. That's the
21 short version.

22 JUDGE MACE: Okay. I think for the
23 Commission to address this matter, it's going to need
24 the longer version, whatever that might be.

25 MR. SCARP: I'm not sure the longer version

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1 is something I can just state.

2 JUDGE MACE: I'm not asking you to present
3 that orally today. I'm just trying to set a framework
4 for our scheduling, because what I would like to have
5 you do is set up a schedule that would allow this issue
6 to be addressed; in other words, for you to make your
7 jurisdictional argument and then to allow Chelan County
8 to make its argument, and then Staff, wherever Staff is
9 in on this, to respond as well. I don't know. Does
10 Staff have a position on this jurisdictional issue?

11 MR. THOMPSON: Not at this point. I think
12 that's something we need to figure out, to tell you the
13 truth.

14 MR. SCARP: Your Honor, if I may clarify, I
15 think I put it in the posture of perhaps less of a
16 dispute and more of an issue that we are not entitled
17 to unilaterally just make decisions because we are not
18 the only entity that utilizes that railroad track, for
19 one. So it's not something that we state that insofar
20 as an affirmative defense; although, that's the
21 position we stated with regard to the county of
22 Chelan's petition, but our position is simply that the
23 Surface Transportation Board has to be involved in any
24 decision-making that has to deal with moving tracks.

25 JUDGE MACE: Is this matter before the

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1 Surface Transportation Board at this point?

2 MR. SCARP: It is not, Your Honor.

3 JUDGE MACE: What's the process for bringing
4 it before the Surface Transportation Board?

5 MR. SCARP: It's a similar administrative
6 procedure, the details of which are it is an
7 administrative proceeding, but there are a number of
8 factors that are considered in that, and the question
9 would be how the petition is made. We would submit
10 that that petition needs to be made through the party
11 that wishes to make a change in the operation and the
12 condition of the track.

13 JUDGE MACE: Mr. Chernak, I'm interested in
14 hearing from you just briefly right now whether or not
15 you had contemplated going to the Surface
16 Transportation Board.

17 MR. CHERNAK: I actually contacted a staff
18 attorney there, and my preliminary response that I
19 received from them was that they weren't much
20 interested in what Chelan County wanted to do, so I
21 didn't pursue a petition with them. I guess waiting to
22 see what happens in terms of any briefing or any motion
23 that is brought by the Railroad so we can respond to
24 it. I've done some research on their affirmative
25 defenses, and I haven't really concluded yet that we

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1 need to go to the Surface Transportation Board.

2 JUDGE MACE: Do you have anything to add,
3 Mr. Thompson?

4 MR. THOMPSON: If I could pose a question to
5 Mr. Scarp to get an idea of the issue here, is the
6 Railroad's position that there would be nothing left
7 for this commission to decide once the Surface
8 Transportation Board addresses its part? It seems to
9 me there might still be a question of the allocation of
10 the cost for a change to the under-crossing here; is
11 that correct?

12 MR. SCARP: I'm sorry. I lost the last part
13 of your question. You asked first off whether there
14 was anything left for this commission, and then that
15 next part I heard was with regard to allocation of
16 cost.

17 MR. THOMPSON: It seems to me the state
18 statutory scheme provides for the Washington Utilities
19 and Transportation Commission to decide the question of
20 how the cost of a crossing is allocated between the
21 railroad and the road authority?

22 MR. SCARP: Uh-huh. I guess what my
23 principle position is, and I'm trying to also keep this
24 in a favorable posture at this time, but I think our
25 position is we would want to make sure that the Surface

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1 Transportation Board is signed off on anything that
2 happens here, and their decision-making with regard to
3 changes on the main line track, we submit, is required.

4 I'm not sure what Mr. Chernak heard from the
5 staff member and what interest they said they expressed
6 or not, but it's not something that the Railroad is
7 unilaterally allowed to do, if that answers your
8 question. We are not taking the position that this
9 proceeding has no standing. We are just trying to make
10 sure that all the ducks are in a row.

11 JUDGE MACE: So it sounds like your answer to
12 Mr. Thompson's question is that the UTC would still
13 have a role to play in the outcome of this petition, I
14 guess, for want of a better word, or this change to the
15 roadway.

16 MR. SCARP: Your Honor, without knowing
17 specifically where we are headed, I'll reserve further,
18 but I think I'm just going to let my previous answer
19 stand insofar as -- I don't want to say without a
20 detailed briefing on what I think the STD's purpose is
21 in all of this. I'm not disagreeing with Mr. Thompson
22 on what the statute says and where this is likely
23 headed.

24 JUDGE MACE: It sounds like we are back where
25 we started, which is that we need to develop a schedule

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1 that will allow the parties to brief these issues.

2 What I would like to do is have you spend
3 some time developing that schedule, and also, a
4 schedule that would allow for a hearing in this case in
5 the event that the Commission does continue to have a
6 role to play, whether it's complementary to the STD or
7 primary, so I would like to give you all some time now
8 to talk about that.

9 We do have a couple of other items to
10 address, but I think we can address those when I come
11 back to talk with you about scheduling, and those items
12 are protective order and discovery, whether or not
13 those would be required in this case. I would like to
14 adjourn now for 15 minutes and give you all an
15 opportunity --

16 MR. SCARP: Your Honor, would it be better
17 for the parties to try to work out the schedule between
18 them and submit that back to the Commission? I'm only
19 wondering about the time frame here. I've got a
20 handful of things. I'm in Bellingham interrupted from
21 a deposition, and I would be happy to discuss all the
22 other matters, and perhaps Mr. Chernak, Mr. Thompson,
23 and myself could put together a schedule without
24 interrupting, if that's feasible.

25 JUDGE MACE: Typically in a prehearing

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1 conference, that's one of the main purposes is to set a
2 schedule, and we usually allow the parties an
3 opportunity to do that while we are in the midst of the
4 hearing just so that we then have the schedule.

5 However, let me hear from the parties on what they want
6 to do about this. Mr. Thompson? I'm assuming you are
7 saying, Mr. Scarp, that we do this in another way?

8 MR. SCARP: That's correct, Your Honor, and
9 I'm certainly open. I'm just trying to expedite due to
10 my circumstances, unfortunately, and I will be happy to
11 do whatever the Court wants to do, but I just thought
12 that whatever the parties want to put together, perhaps
13 it would be easier to do so, at least for me, with a
14 better understanding and opportunity to talk with both
15 Mr. Thompson and Mr. Chernak.

16 JUDGE MACE: Let me hear from Mr. Thompson.

17 MR. THOMPSON: That would be fine with me to
18 work this out. I don't know what your expectation is,
19 Your Honor, as far as --

20 JUDGE MACE: I wish, Mr. Scarp, that we had
21 the time to do this today. I'm sorry your schedule is
22 so tight, but we do have this hearing, and it would be
23 good to get it over with. We have to do it one way or
24 the other. Mr. Chernak?

25 MR. CHERNAK: I think the biggest concern the

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1 County would have would be getting it done in time so
2 we can do the project. If it's going to come around,
3 we don't want to lose funding. We do have some time,
4 but I know that we certainly would like to do this in
5 an expeditious fashion.

6 I understand Mr. Scarp probably pretty well
7 has the month of February taken up by litigation, so if
8 anything, we are probably looking at the month of March
9 sometime to start any kind of motion hearings or other
10 proceedings.

11 JUDGE MACE: I guess I'm not sure what's
12 happening here. I guess I'm not understanding what the
13 parties are talking about. Mr. Scarp, is it that you
14 don't want to spend time today in the hearing
15 developing a schedule, or is that your schedule is so
16 tight over the next month that you are worried about
17 when you can do this?

18 MR. SCARP: It's both, Your Honor. I'm
19 starting a major trial the first week of March, and
20 this is part and parcel of it. I'm in Bellingham at
21 the moment. So I'm happy to work out with anyone, and
22 if they want to do it in the next few minutes and try
23 to do that, that's fine.

24 JUDGE MACE: Yes, let's do it in the next few
25 minutes, and then you won't have to worry about it

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1 later on. I would appreciate it if we could. So I'm
2 going to give you 15 minutes now, and hopefully, you
3 can come up with a schedule that will work for
4 everybody; okay?

5 MR. THOMPSON: Maybe if we can do it quicker
6 than that, can I just come and get you?

7 JUDGE MACE: Yes. Come down to my office,
8 and I'll come back and we will be back on the record.
9 Thank you.

10 (Discussion off the record.)

11 JUDGE MACE: Mr. Scarp, go ahead.

12 MR. SCARP: Your Honor, I think that we've
13 determined, if nothing else, that your 15-minute
14 allotment was well advised.

15 JUDGE MACE: I'm glad to hear that. Do you
16 have a schedule?

17 MR. SCARP: Your Honor, I'll take a stab at
18 it and certainly willing to allow anyone to jump in and
19 correct me. I'm just working from my notes.

20 What we've come up with is that the first
21 date we have is prior April 6th, 2007, Chelan and BNSF
22 will have a meeting and possible settlement conference
23 to work out any issues that may be between the parties
24 in hopes of resolving whatever those may be.

25 The second date that we have regards any

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1 briefing of any jurisdictional issues, and the date for
2 BNSF briefing on that is May 4, 2007. Chelan's
3 response with regard to jurisdictional issues is June
4 1, 2007, and any BNSF reply would be due by June 15,
5 2007. Hearing on the matter, if required, would be by
6 June 22nd, but, of course, subject to the Court's
7 calendar.

8 JUDGE MACE: I'm asking now whether or not
9 you are intending to hold the hearing on June 22nd,
10 because at least I'm free on that date.

11 MR. SCARP: That, I think, worked for
12 everyone.

13 JUDGE MACE: The only fly in that ointment,
14 I'm not entirely sure the commissioners will be sitting
15 on this hearing, and I will need to consult with our
16 director and see whether or not that's something we
17 need to deal with. It puts a different gloss on the
18 scheduling, but when I send out the prehearing
19 conference notice, I will have resolved that issue, so
20 right now, we will think about June 22nd for the date
21 of the hearing, and you only need one day?

22 MR. SCARP: That would be plenty.

23 MR. THOMPSON: Just for clarification, this
24 would just be the hearing on the initial jurisdictional
25 question.

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1 JUDGE MACE: Oh, I see. Go ahead. Anything
2 else that's part of the schedule?

3 MR. SCARP: No. In moving on with the
4 substantive schedule, the substantive briefing
5 schedule, the date for Chelan's designated testimony
6 would be July 13.

7 JUDGE MACE: Okay.

8 MR. SCARP: Factoring in the discovery on
9 that, BNSF's directed or designated testimony would be
10 August 10th. Chelan's second round of testimony, if
11 any, would be August 24, and the hearing, again subject
12 to the Commission's schedule, would be like December
13 28th.

14 JUDGE MACE: Did you say December?

15 MR. SCARP: I'm sorry. September.

16 MR. CHERNAK: I believe two other issues,
17 that we are invoking discovery?

18 JUDGE MACE: Yes.

19 MR. CHERNAK: My understanding is we will go
20 ahead and do that, and the Railroad, I understand, is
21 going to reserve the issue of protective order. We
22 weren't seeing anything right now that required that.

23 JUDGE MACE: Then I will indicate in the
24 prehearing conference order that the discovery rules
25 are invoked, and we will reserve ruling on the

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1 protective order issue. The parties should notify me
2 if they feel they need to have one.

3 MR. SCARP: We would anticipate it would be
4 done by agreed order.

5 MR. CHERNAK: Right.

6 JUDGE MACE: Let me make sure I have covered
7 all the items I need to. You will be receiving
8 instructions in the prehearing conference order with
9 regard to document preparation and filing requirements,
10 and that will tell you the number of copies of
11 documents you have to file with the Commission, and it
12 appears that you already have in mind to attempt
13 settlement in this case, so you have met the alternate
14 dispute resolution item in the prehearing conference
15 order. Is there anything else we need to address at
16 this point?

17 MR. CHERNAK: I don't have anything else,
18 Your Honor.

19 MR. SCARP: I don't have anything else, Your
20 Honor.

21 MR. THOMPSON: Nothing from Staff.

22 JUDGE MACE: I thank you very much for your
23 cooperation. I'm hoping, Mr. Scarp, that this didn't
24 eat up too much of your time, but sometimes it's better
25 to take the time so that we can resolve some of these

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1 things immediately.

2 MR. SCARP: Agreed, Your Honor.

3 JUDGE MACE: We are adjourned, and thank you
4 again.

5 (Prehearing conference adjourned at 10:28 a.m.)

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