Seattle, Washington 98101 Telephone (206) 625-1801 Facsimile (206) 625-1807

location referenced in the Petition.

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- 3. In response to paragraph 3 of the Petition, BNSF admits that the rail line includes a main line used by both passenger and freight trains at the estimated speeds and volumes stated in the Petition.
- 4. In response to paragraph 4 of the Petition, BNSF lacks sufficient information to respond affirmatively and as such does not admit or deny the allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 5. In response to paragraph 5 of the Petition, BNSF lacks sufficient information respond affirmatively and as such does not admit or deny the allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 6. In response to paragraph 6 of the Petition, BNSF admits that the Chumstick Highway crosses under the BNSF railroad trestle in question. BNSF does not admit or deny the remaining allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 7. In response to paragraph 7 of the Petition, BNSF admits that Chelan County has proposed altering and relocating the crossing and that County officials and BNSF have met to discuss some of the issues involved in that project. At present, BNSF lacks sufficient information regarding the design, construction and financing of Chelan County's proposed alteration and relocation project, and as such BNSF does not admit or deny the remaining allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 8. In response to paragraph 8 of the Petition, BNSF admits that since the crossing is grade separated the issues of warning devices and crossing circuitry do not apply.
- 9. In response to paragraph 9 of the Petition, BNSF admits that since the proposed crossing is to be grade separated the issues of warning devices and crossing circuitry do not apply.
- 10. In response to paragraph 10 of the Petition, BNSF has only recently been provided multiple drawings of the proposed relocation project showing alternative design proposals. BNSF therefore does not admit or deny the allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.

11. In response to paragraph 11 of the Petition, BNSF denies the "preliminary estimate" of \$1,750,000.00 (\$1.75 million) to alter and relocate the railroad trestle. BNSF admits that Chelan County officials and BNSF representatives met in the Fall of 2006 to discuss some of the issues involved in the proposed alteration and relocation of the railroad facility, including certain cost estimates, however it is BNSF's belief that the estimate solely for the temporary (shoo-fly) track will exceed \$2 - \$3 million dollars not including the cost of the permanent structure which is expected to costs several million dollars depending on the design selected by Chelan County for its project and construction costs at that time. BNSF further denies any obligation to fund the County's project as referenced in the Petition impliedly relating to "the county's share of the cost." BNSF does not admit or deny the remaining allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.

## **Affirmative Defenses**

- 1. <u>Jurisdiction</u>. The railroad bridge in question that crosses over the Chumstick Highway is a serviceable "railroad facility" within the meaning of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. 10501, *et seq.*, which vests exclusive jurisdiction over railroad facilities in the Surface Transportation Board ("STB"). 49 U.S.C. 10501(b)(2). Accordingly, BNSF respectfully contends that the Commission does not have jurisdiction over the railroad facility.
- 2. <u>Authority</u>. Due to the exclusive jurisdiction of the STB over railroad facilities, in addition to the uncertainty relating to land acquisition required for the proposed project, and funding for the County's project, BNSF respectfully submits that the Commission lacks authority to grant the relief sought by the Petitioner.
- 3. <u>Taking</u>. Without additional information, which BNSF will request through discovery, BNSF contends the relief sought by Petitioner may constitute a taking if not based on full and proper compensation under Washington State and federal law.

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4. <u>Ripeness</u>: Without waiving the defense of lack of jurisdiction, BNSF respectfully submits that the relief sought in the Petition is not ripe for review unless and until the matter has been brought before and adjudicated by the STB.

BNSF reserves the right to supplement its Affirmative Defenses as additional information is obtained.

## **Prayer For Relief**

- 1. BNSF requests a preliminary hearing on the issues raised in this Answer.
- 2. BNSF requests a stay of proceedings due to lack of jurisdiction or any other affirmative defenses raised.
- 3. BNSF requests a stay of any proceedings by the Commission on this matter unless and until it has been brought before and adjudicated by the STB.
- 4. BNSF acknowledges that the parties have been in communication regarding the proposal set forth in the Petition and believes that further discussions are warranted. BNSF believes that the parties will benefit from further direct communications regarding the Petition, or in the alternative a mediation proceeding.

<u>Certification</u>: I certify under penalty of perjury that the foregoing is true and correct based on my knowledge and information of the matters set forth herein.

DATED this 3rd day of May, 2007.

Montgomery Scarp MacDougall, PLLC

Tom Montgomery, WA. Bar No. 19998

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