

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WHATCOM COUNTY,

Petitioner,

v.

BNSF RAILWAY COMPANY,  
Respondent.

DOCKET TR-190818

ORDER 01

PREHEARING CONFERENCE  
ORDER; DEFAULT ORDER

- 1 **NATURE OF PROCEEDING.** On November 5, 2019, Whatcom County filed with the Washington Utilities and Transportation Commission (Commission) a Petition for Installation of Median Barriers at a Highway-Rail Grade Crossing (Petition). The Petition seeks to install median barriers at the crossing at Cove Road, Bellingham, Washington.
- 2 On November 6, 2019, the Commission sent a letter to BNSF Railway Company (BNSF) requesting a response within 20 days indicating its support or opposition to the Petition. BNSF did not respond.
- 3 On December 13, 2019, the Commission issued a Notice of Prehearing Conference (Notice) set for January 30, 2020, at 1:30 p.m.
- 4 **CONFERENCE.** The Commission convened a prehearing conference (PHC) in this docket at Lacey, Washington, on January 30, 2020, before Administrative Law Judge Rayne Pearson.
- 5 **APPEARANCES.** Christopher Quinn, Senior Civil Deputy, Whatcom County Prosecuting Attorney, Bellingham, Washington, represents Whatcom County. Jeff Roberson, Assistant Attorney General, Lacey, Washington, represents Commission Staff.<sup>1</sup> Whatcom County and Staff were the only parties appearing at the hearing.
- 6 **REQUEST FOR DEFAULT.** Whatcom County moved to hold BNSF in default pursuant to RCW 34.05.440(2) and WAC 480-07-450 and requested the Commission

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<sup>1</sup> In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

grant its Petition. Staff supports the motion for default and recommends the Commission direct Staff to draft for the Executive Secretary's review and signature a delegated order granting the Petition. Based on BNSF's failure to appear, the Administrative Law Judge orally granted Whatcom County's request to enter a default order.

7 **RESPONSE TO PETITION.** On January 30, 2020, shortly after the PHC was adjourned, BNSF contacted Staff about the status of the proceeding. BNSF subsequently notified the presiding officer that it does not oppose the Petition, and that it would enter both a notice of appearance and a response indicating its position.

8 On January 31, 2020, BNSF entered a notice of appearance and filed a response stating it does not oppose the Petition.

9 BNSF's failure to timely respond or appear at the PHC is unacceptable. Both the Commission and the parties expended resources preparing for, and attending, the PHC. BNSF's failure to respond also unnecessarily delayed the relief requested in the Petition. Although a default judgment is unnecessary in light of BNSF's late-filed response, we nevertheless enter this default order to impress upon BNSF the importance of responding to the Commission's communications and notices.<sup>2</sup>

10 **DEFAULT.** RCW 34.05.440(2) allows the presiding officer discretion to enter a "default or other dispositive order" if a party fails to appear at the hearing. In addition, the Notice stated that any party who failed to attend or participate in the PHC may be held in default in accordance with the terms of RCW 34.05.440 and WAC 480-07-450. RCW 34.05.440(2) provides: "If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding ... the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order." WAC 480-07-450(1) provides that that the Commission may find a party in default if the party fails to appear at the time and place set for a hearing.

11 The Commission electronically served BNSF with the Notice on December 13, 2019, more than 45 days in advance of the PHC. Accordingly, BNSF was properly and legally served and provided due and proper notice of the time and place set for hearing. BNSF did not appear at the PHC and is therefore held in default.

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<sup>2</sup> If BNSF fails to respond to Staff communications requesting a response to a petition, the Commission must establish a time and place for hearing. *See* RCW 81.53.060. BNSF's failure to respond to the Commission's request does not constitute an affirmative waiver of hearing.

12 **ORDER.** BNSF being in default, the Commission will grant the Petition. We direct Staff to draft for the Executive Secretary's review and signature a delegated order to that effect.

Dated at Lacey, Washington, and effective February 4, 2020.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

*/s/ Rayne Pearson*

RAYNE PEARSON

Administrative Law Judge

**NOTICE TO PARTIES: WAC 480-07-450(2) states that a party held in default has 10 days after service of a default order to file a written motion requesting the order be vacated and the proceeding reopened for further process. The party held in default must state the grounds relied upon, including its reasons for failing to appear. A party held in default must file a written motion requesting the order be vacated pursuant to WAC 480-07-450(2) within 10 days after service in order to have the Commission consider a Petition for Administrative Review from that party.**