

**Docket No. TR-220540**

**City of Wenatchee v. Burlington Northern Sante Fe  
Railway**

**October 25, 2022**



**206.287.9066 | 800.846.6989**

1325 Fourth Avenue, Suite 1840, Seattle, Washington 98101

[www.buellrealtime.com](http://www.buellrealtime.com)

email: [info@buellrealtime.com](mailto:info@buellrealtime.com)



BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION

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CITY OF WENATCHEE,                    ) DOCKET TR-220540  
  )  
                          Petitioner,    )  
  )  
                          vs.                )  
  )  
BURLINGTON NORTHERN SANTE) )  
FE RAILWAY,                            )  
  )  
  )  
                          Respondent.    )

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VIRTUAL PREHEARING CONFERENCE, VOLUME I  
Pages 1-14  
ADMINISTRATIVE LAW JUDGE RAYNE PEARSON

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October 25, 2022  
11:08 a.m.

Washington Utilities and Transportation Commission  
621 Woodland Square Loop Southeast  
Lacey, Washington 98503

REPORTED BY: TAYLER GARLINGHOUSE, CCR 3358

Buell Realtime Reporting, LLC  
1325 Fourth Avenue, Suite 1840  
Seattle, Washington 98101  
(206) 287-9066 | Seattle  
(360) 534-9066 | Olympia  
(800) 846-6989 | National

[www.buellrealtime.com](http://www.buellrealtime.com)

1 A P P E A R A N C E S

2 ADMINISTRATIVE LAW JUDGE:

3 RAYNE PEARSON

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5

6 FOR COMMISSION STAFF:

7

JEFF ROBERSON  
Office of the Attorney General  
Utilities and Transportation  
Division  
P.O. Box 40128  
Olympia, Washington 98504  
(360) 664-1188  
jeff.roberson@utc.wa.gov

8

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10

11

12

FOR THE CITY OF WENATCHEE:

13

STEVE SMITH  
Davis, Arneil Law Firm, LLP  
617 Washington Street  
Wenatchee, Washington 98801  
(509) 662-3551  
steve@dadkp.com

14

15

16

17

FOR BNSF:

18

CHRISTOPHER G. EMCH  
Foster Garvey PC  
1111 Third Avenue, Suite 3000  
Seattle, Washington 98101  
(206) 447-4400  
chris.emch@foster.com

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1 LACEY, WASHINGTON; OCTOBER 25, 2022

2 11:08 A.M.

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

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6 JUDGE PEARSON: Let's go ahead and be on the  
7 record. This is Docket TR-220540, which is a petition  
8 filed by the City of Wenatchee to modify warning devices  
9 at a highway railroad grade crossing at 9th Street.

10 Today is Tuesday, October 25th, 2022, at  
11 11:00 a.m. It's actually 11:08 a.m. We're here for a  
12 prehearing conference to discuss scheduling and other  
13 procedural issues.

14 My name is Rayne Pearson. I'm the  
15 administrative law judge presiding over this case.

16 So let's begin by taking short appearances.  
17 Just please state your name and who you represent, and  
18 we'll start with the City of Wenatchee.

19 MR. SMITH: Steve Smith. I'm the City  
20 attorney for Wenatchee.

21 JUDGE PEARSON: Okay. Thank you.

22 And for BNSF?

23 MR. EMCH: Your Honor, Chris Emch, from  
24 Foster Garvey, on behalf of Respondent BNSF Railway  
25 Company.

1 JUDGE PEARSON: Thank you.

2 And for Staff?

3 MR. ROBERSON: Good morning, Judge Pearson.  
4 My name is Jeff Roberson, and I'm an AAG. I represent  
5 Commission Staff.

6 JUDGE PEARSON: Thank you.

7 Is there any other party present who's  
8 seeking to intervene?

9 Okay. Hearing nothing, let's move on to  
10 procedural matters. Do the parties want the discovery  
11 rules to be available in this case?

12 MR. EMCH: Yes, Your Honor. Perhaps I could  
13 address a preliminary issue if that might be helpful?

14 JUDGE PEARSON: Sure.

15 MR. EMCH: So, Your Honor, we filed a notice  
16 of appearance yesterday and we're relatively new to the  
17 matter, Your Honor. But a core issue in this case, as  
18 we understand it, is the application of Washington  
19 statute RCW 81.53.295 regarding costs and particularly  
20 the statutory allocation of a hundred percent of the  
21 maintenance cost to the Railroad.

22 And, Your Honor, we also understand from a  
23 recent decision by the UTC in the City of Spokane Valley  
24 case that the Commission has stated and concluded and  
25 held because it's not a court, it lacks the authority to

1 declare or rule in the constitutionality of that statute  
2 and that only a court has the power to determine the  
3 constitutionality of the law administered by the  
4 administrative body.

5           And so in this case, Your Honor, BNSF  
6 believes and strongly maintains that that RCW is  
7 unconstitutional. And so we're -- we're in the process  
8 and will be filing a federal court complaint in the  
9 Eastern District of Washington to address that legal  
10 issue and the constitutionality of that statute.

11           And so, Your Honor, what I would propose is  
12 as a preliminary matter is we continue the prehearing  
13 conference for 30 days. BNSF would file that complaint.  
14 We will work cooperatively with counsel to set an  
15 expeditious schedule to get a ruling from the federal  
16 court on that legal issue first and then -- and then  
17 reconvene the status conference depending on the outcome  
18 of that proceeding, which could provide a little clarity  
19 for how this matter may or may not proceed, go forward.

20           And so I apologize for introducing this now,  
21 but like I said, we've just -- just appeared yesterday.  
22 We're relatively new to the matter. We're working as  
23 fast as we can to get that complaint on file, and I just  
24 wanted to put that on the table at the outset of the  
25 conference for -- for consideration.

1 JUDGE PEARSON: All right. I will give the  
2 City and Staff a chance to respond.

3 MR. SMITH: Thank you, Your Honor. This is  
4 Steve Smith on behalf of the City of Wenatchee. The  
5 City's concern I think would be the delay to this  
6 proceeding and to its project. I understand Burlington  
7 Northern's concern and desire to have this resolved in  
8 the federal court, which makes sense to us. But the  
9 concern I think the City would have is that could take  
10 quite a while because there would be an initial trial  
11 court ruling and then potential appeals after that,  
12 which would put our project out for quite some time. It  
13 could potentially be a year or two depending on the  
14 result of appeals.

15 And so I think our interest would be to  
16 continue this proceeding at the same time so that we  
17 could progress towards getting our project started while  
18 the federal court action was pending.

19 JUDGE PEARSON: Okay. Thank you.

20 And Mr. Roberson?

21 MR. ROBERSON: I think Staff is interested  
22 in seeing this crossing made safer, and so Staff is also  
23 of the opinion that it's probably best to work and try  
24 both proceedings absent some kind of order arresting  
25 these proceedings from the federal court.

1 JUDGE PEARSON: Okay. Thank you. And I  
2 agree. We're going to go ahead and proceed with this  
3 case on a parallel track.

4 So with that in mind, I guess maybe we  
5 should take a break so the parties can discuss the  
6 schedule because, of course, you can design the schedule  
7 in any way that you want to allow additional time or a  
8 little additional time or reach some sort of compromise  
9 around time.

10 So would that work for the parties? I  
11 assume you haven't had an opportunity to discuss the  
12 schedule based on what's being presented right now.

13 MR. SMITH: Well, Your Honor, Mr. Roberson  
14 had actually sent out kind of a proposed schedule which  
15 the City was agreeable with. I don't think we heard  
16 from Burlington Northern, however, so I'm not sure what  
17 their position is.

18 MR. EMCH: Your Honor, yes, thank you. So  
19 yeah, Mr. Roberson did -- did forward the proposed  
20 schedule yesterday afternoon after we filed the notice  
21 of appearance. And I think ballpark if the -- if the  
22 matter is going to go forward, we're, you know, happy to  
23 work with counsel on -- on a schedule similar to what  
24 was proposed. I would probably build in an extra 30  
25 days just before the submission of the initial direct



1 testimony.

2           So I -- I -- we're in the process of sort of  
3 evaluating how that schedule would work on our end. But  
4 I think it -- it is probably generally okay as long as  
5 we can kick out things an additional month than what was  
6 proposed by Mr. Roberson.

7           JUDGE PEARSON: Okay. So it sounds like we  
8 should take a break so the parties can discuss.

9           MR. SMITH: Your Honor, this is Steve Smith  
10 again. I think that would be fine. Sounds to me like  
11 we could work out an agreed schedule. So yeah, I think  
12 we'd probably be better spending our time talking  
13 between ourselves and working that out.

14           JUDGE PEARSON: Okay. That sounds --

15           MR. EMCH: Your Honor, I might make one  
16 suggestion. I know as part of that schedule, I know one  
17 of the topics for potential discussion today is the --  
18 regarding the pleadings. We would be happy to file --  
19 if it would be helpful to the parties and clarify any  
20 issues, happy to file a more formal response or answer  
21 to the City of Wenatchee's petition. I know that BNSF  
22 did an initial response coming -- internally for the  
23 business folks. But if that would be helpful to the  
24 parties and -- to just clarify the issues, if this  
25 hearing's going to go forward, we're happy to file,

1 prepare and file a more formal response or answer to the  
2 City's petition on the front end.

3 JUDGE PEARSON: Okay. Well, I'll allow the  
4 parties to discuss that too while we're on break.

5 MR. EMCH: Thank you.

6 JUDGE PEARSON: Okay. So let's go ahead,  
7 and for the court reporter's purposes, let's be in  
8 recess.

9 (A break was taken from

10 11:16 a.m. to 11:35 a.m.)

11 JUDGE PEARSON: Let's be back on the record  
12 following a brief recess. And I understand that the  
13 parties have had some time to discuss a procedural  
14 schedule.

15 And, Mr. Roberson, did you want to read that  
16 into the record?

17 MR. ROBERSON: Certainly, I can.

18 BNSF will file its answer to the City's  
19 petition on November 15th, 2022; the City will provide  
20 its direct testimony January 20th, 2023; BNSF and Staff  
21 would submit response testimony on March 3rd, 2023; the  
22 parties would submit rebuttal and cross-answering  
23 testimony on March 31st, 2023; the discovery cutoff  
24 would be April 21st, 2023; cross-exhibits,  
25 cross-estimates, and witness lists would be due

1 May 15th, 2023; the hearing and the public comment  
2 hearings would be on May 22nd, 2023; simultaneous post  
3 hearing briefs would be due June 23rd, 2023.

4 And then the parties ask that the Commission  
5 just set a placeholder date for the settlement  
6 conference and allow the parties to select a date and  
7 notify the Commission by email.

8 JUDGE PEARSON: Okay. Thank you. So just  
9 to confirm, you said cross-examination, exhibits, and  
10 time estimates and presentation of witnesses would be  
11 May 15th?

12 MR. ROBERSON: Yes.

13 JUDGE PEARSON: Okay. I think I got all of  
14 those other dates. Okay. So both of the evidentiary  
15 and public comment hearings will be conducted virtually  
16 via Zoom, and we can use the same link for the  
17 evidentiary hearing and the public comment hearing.  
18 Were the parties wanting to set the public comment  
19 hearing for the evening of May 22nd, then?

20 MR. ROBERSON: Yes.

21 JUDGE PEARSON: Okay. And what about the  
22 start time for the evidentiary hearing?

23 MR. ROBERSON: It does sound as if the  
24 parties anticipate something of a longer hearing, so it  
25 may be better to set it for 9:00 or 9:30.

1 JUDGE PEARSON: Okay. We can set it for  
2 9:00 a.m. That's fine.

3 And then 6:00 p.m. for the public comment  
4 hearing?

5 MR. ROBERSON: It is traditional.

6 JUDGE PEARSON: Okay. All right. Is there  
7 anything else that we need to address today?

8 MR. ROBERSON: Not from Staff.

9 MR. SMITH: Not from the City of Wenatchee.

10 MR. EMCH: Your Honor, just one clarifying  
11 question. And thank you. I understand that this case  
12 schedule -- with this case schedule that the UTC  
13 proceeding would be moving forward. There's also an  
14 issue of potentially saying -- just the issue regarding  
15 the constitutionality of that statute. Is that  
16 something that you would be willing to contemplate  
17 depending on the outcome of the federal proceedings? In  
18 other words, moving forward on some of the factual  
19 issues regarding the physical structure, but say the  
20 constitutionality question regarding the application of  
21 that statute and the maintenance costs?

22 JUDGE PEARSON: I don't think I understand  
23 the question. Are you asking me if we would set that  
24 question aside while we were waiting for an answer on  
25 it?

1           MR. EMCH: Yes. The legal issue regarding  
2 the constitutionality of that statute, if we could set  
3 that issue aside or say any ruling determination on that  
4 legal issue. I'm just throwing that out there as a  
5 possibility. And my clarifying question is whether you  
6 anticipate going forward on all issues in this matter  
7 regardless of the existence of the federal proceedings?

8           JUDGE PEARSON: That is usually how we  
9 operate, yes. We operate as though the statutes they  
10 give us our authority are, in fact, constitutional  
11 barring some other decision from another body. So yes,  
12 we would proceed as if as though we always have.

13           MR. EMCH: Okay. Thank you very much. I  
14 appreciate that clarification.

15           JUDGE PEARSON: Okay. Anything else?

16           Okay. Hearing nothing, I will issue a  
17 prehearing conference order reflecting the schedule. I  
18 guess -- oh, I do need to check back with the parties.  
19 I assume that you all do want the discovery rules  
20 available? We didn't quite reach that question  
21 initially.

22           MR. EMCH: Yes from BNSF, Your Honor.

23           JUDGE PEARSON: Okay. And I assume that I'm  
24 not hearing anyone else, that no party has an objection  
25 to that?

1 MR. SMITH: Yeah, we don't object to it,  
2 Your Honor.

3 JUDGE PEARSON: Okay.

4 MR. ROBERSON: Nor does Staff.

5 JUDGE PEARSON: Thank you.

6 All right. Well, if there's nothing  
7 further, then we are adjourned. Thank you all.

8 (Adjourned at 11:41 a.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON  
COUNTY OF THURSTON

I, Tayler Garlinghouse, a Certified Shorthand Reporter in and for the State of Washington, do hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.

  
Tayler Garlinghouse, CCR 3358

