

**Docket No. TR-220540**

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

**October 25, 2022**



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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

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1                   A P P E A R A N C E S  
2   ADMINISTRATIVE LAW JUDGE:  
3                   RAYNE PEARSON  
4  
5  
6   FOR COMMISSION STAFF:  
  
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1                   LACEY, WASHINGTON; OCTOBER 25, 2022  
2                   11:08 A.M.  
3                   --o0o--  
4                   P R O C E E D I N G S  
5  
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.

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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

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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.

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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.

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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

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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,

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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

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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.

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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?

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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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1 CERTIFICATE

2  
3 STATE OF WASHINGTON  
4 COUNTY OF THURSTON

5  
6 I, Tayler Garlinghouse, a Certified Shorthand  
7 Reporter in and for the State of Washington, do hereby  
8 certify that the foregoing transcript is true and  
9 accurate to the best of my knowledge, skill and ability.

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Tayler Garlinghouse, CCR 3358



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