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5 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

6 CITY OF WENATCHEE

7 Petitioner,

DOCKET No. TR-220540

8 v.

9 BNSF RAILWAY COMPANY,

**ANSWER OF BNSF RAILWAY  
COMPANY TO PETITION TO MODIFY  
WARNING DEVICES AT A HIGHWAY-  
RAILROAD GRADE CROSSING**

10 Respondent.  
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12 Respondent BNSF Railway Company (“Respondent” or “BNSF”), by and through its  
13 undersigned counsel, hereby answers Petitioner City of Wenatchee’s Petition To Modify Warning  
14 Devices At A Highway-Railroad Grade Crossing (“Petition”) as follows:  
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16 **I. ANSWER TO PETITION**

17 1. In response to Section 1 (“Petitioner’s Information”) of the Petition, BNSF states  
18 that the City’s contact information in Section 1 speaks for itself and no response is required, except  
19 that BNSF notes that counsel for the City has subsequently appeared for the City in this action and  
20 BNSF will serve City’s counsel in this action rather than the City contact person stated in Section 1.

21 2. In response to Section 2 (“Respondent’s Information”) of the Petition, BNSF states  
22 that the undersigned counsel has appeared for BNSF in this action and all parties should serve  
23 BNSF’s undersigned counsel in this action rather than the BNSF contact person stated in Section 2.

24 3. In response to Section 3 (“Crossing Location”) of the Petition, BNSF admits that  
25 this is the City’s representation of the Crossing location and that it appears to be correct.

26 4. In response to Section 4 (“Highway Information”) of the Petition, BNSF admits  
that this is City’s representation of certain information regarding the Highway and states that it  
currently lacks sufficient information to verify the City’s representations of the information stated

1 in Section 4, including the current average annual daily traffic (AADT), how many school buses  
2 travel over the crossing each day, the impact of recent construction on AADT over the next ten  
3 years, and current sight distances, pending discovery and testimony to be provided in this action.

4 5. In response to Section 5 (“Railroad Information”) of the Petition, BNSF admits that  
5 it is the railroad company in this action, admits that the type of railroad at the crossing are common  
6 carrier and passenger, that the type of tracks at the crossing are main line, and that there are two  
7 tracks. BNSF denies that the City’s representations of the average daily freight train traffic and  
8 freight train speeds are currently accurate. BNSF admits that the average daily passenger train  
9 traffic is two, but denies that the City’s representation of the passenger train speeds is currently  
accurate.

10 6. In response to Section 6 (“Current Warning Devices”) of the Petition, BNSF admits  
that this is the City’s “complete description” upon which the City bases its Petition.

11 7. In response to Section 7 (“Description of Proposed Changes”) of the Petition, BNSF  
12 admits that this is the City’s description of the proposed changes upon which the City bases its  
13 Petition. With respect the last sentence of Section 7, BNSF construes this sentence as what the  
14 City is proposing and not necessarily what is legally required.

15 8. In response to Section 8 (“Illustration of Crossing”) of the Petition, BNSF admits  
16 that the diagrams, drawing and maps provided in Section 8 are the City’s illustration of crossing  
upon which the City bases its Petition.

17 9. In response to Section 9 (“Description of Public Safety Need”) of the Petition,  
18 BNSF admits that this is the City’s description of the public safety need for the City’s proposed  
19 changes. As discovery and testimony in this case will show, however, BNSF does not agree that  
20 the description in Section 9 justifies all the proposed changes in the City’s Petition, does not agree  
21 that all the proposed changes are required by applicable law, and does not agree with the City’s  
22 proposed layout. *See, e.g.*, BNSF’s Stephen Semenick’s August 8, 2022 email to the UTC and the  
City regarding the City’s Petition.

23 10. In response to Section 10 (“Approximate Cost of Installation And Related Work”) of  
24 the Petition, BNSF admits that this is the City’s representation of the approximate cost of  
25 installation and related work upon which the City bases its Petition. BNSF does not agree that this  
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1 description is currently accurate. For example, the \$687,600 in estimated railroad work is not  
2 current, as discovery and testimony in this case will show.

3 11. In response to Section 11 (“Approximate Cost of Annual Maintenance”) of the  
4 Petition, BNSF admits that this is City’s representation of certain costs of annual maintenance,  
5 admits that BNSF previously provided a cost estimate for inspection/maintenance fees, but denies  
6 that the Section 11 estimate of \$45,600 reflects a current cost estimate. BNSF further denies the  
7 City’s last sentence of Section 11 (“Per RCW 81.53.295, all annual maintenance costs will be paid  
8 for by BNSF Railway Company.”) and any legal conclusions contained therein. BNSF further  
9 states that the City’s proposed changes would not provide an ascertainable benefit to BNSF and  
10 BNSF cannot be compelled to provide costs. As the City and UTC know, BNSF does not agree  
11 that RCW 81.53.295 constitutionally requires BNSF to pay all annual maintenance costs. *See*  
12 *BNSF Railway Company v. City of Wenatchee*, United States District Court for the Eastern District  
13 of Washington, Case No. 2:22-cv-00263.

14 12. In response to Section 12 (“Cost Apportionment”) of the Petition, BNSF states this  
15 Section appears to be form language and that no specific information is provided by the City in  
16 this Section. With respect to the first paragraph of Section 12, BNSF admits this is what the City’s  
17 Petition appears to be requesting, but as noted above, BNSF does not agree that the Commission  
18 can constitutionally require BNSF to pay all annual maintenance costs. *See BNSF Railway*  
19 *Company v. City of Wenatchee*, United States District Court for the Eastern District of Washington,  
20 Case No. 2:22-cv-00263. With respect the second paragraph of Section 12, BNSF states that the  
21 parties have not reached an agreement related to the apportionment of costs.

22 13. In response to Section 13 (“Waiver of Hearing of Respondent”) of the Petition, BNSF  
23 states it does not waive its right to a hearing.

24 14. Except as expressly admitted in this answer, BNSF denies the allegations,  
25 contentions, legal conclusions, and requests for relief contained in the City’s Petition and  
26 Attachments.

## II. AFFIRMATIVE AND OTHER DEFENSES

In further response to the City’s Petition, BNSF asserts the following defenses and affirmative  
defenses, the assertion of which in no way alters or modifies City’s burdens of proof or persuasion:

1           1.     Failure to State a Claim. The City’s Petition, in whole or in part, fail to state a claim  
2 upon which relief can be granted.

3           2.     Lack of Subject Matter Jurisdiction. The City’s Petition is barred in whole or in part  
4 because the WUTC lacks jurisdiction over the subject matter.

5           3.     Supremacy Clause. The City’s Petition is barred in whole or in part because the  
6 RCW 81.53.295 provision upon which the City relies is unconstitutional under the supremacy  
7 clause, Article VI, §2 of the United States Constitution. One reason that the RCW 81.53.295  
8 provision upon which the City relies is unconstitutional under the supremacy clause is that federal  
9 law (e.g., the Interstate Commerce Commission Termination Act (“ICCTA”) and federal CFR  
10 regulations) occupy the field with respect to the maintenance costs that an interstate railway must  
11 bear. A second, independent reason that the RCW 81.53.295 provision upon which the City relies  
12 is unconstitutional under the supremacy clause is that the 100% maintenance cost allocation to  
13 interstate railways mandated by this State statute conflicts with federal law governing the  
14 allocation of costs to an interstate railway (e.g., ICCTA and federal regulations – including, but  
15 not limited to, 23 C.F.R. §646.210(a) & (b)(1)).

16           4.     Due Process Clause. The City’s Petition is barred in whole or in part because the  
17 RCW 81.53.295 provision upon which the City relies is unconstitutional under the due process  
18 clause, Section 1 of the 14th Amendment to the United States Constitution. One reason that the  
19 RCW 81.53.295 provision upon which the City relies is unconstitutional under the due process  
20 clause is that the 100% maintenance cost allocation to interstate railways mandated by this State  
21 statute deprives the respondent interstate railway of its property without due process. That is  
22 because it blindly imposes a 100% allocation on the respondent interstate railway without any  
23 consideration or regard for the specific facts and circumstances relating to the maintenance costs  
24 it requires BNSF to pay. In other words, it arbitrarily and capriciously takes BNSF’s property.

25           5.     Interstate Commerce Clause. The City’s Petition is barred in whole or in part because  
26 the RCW 81.53.295 provision upon which the City relies is unconstitutional under the interstate  
commerce clause, Article I, §8, clause 3 of the United States Constitution. One reason that the  
RCW 81.53.295 provision upon which the City relies is unconstitutional under the interstate  
commerce clause is that this statute’s blindly imposing a 100% allocation on interstate railroads  
connecting this State to other States, without any consideration or regard for the specific facts and

1 circumstances relating to the maintenance costs it 100% allocates, is an unreasonable and undue  
2 burden on interstate commerce.

3 6. BNSF reserves the right to supplement and/or amend this list of defenses and  
4 affirmative defenses.

5 **III. REQUESTED RELIEF**

In response to the Petition, BNSF respectfully requests the following relief:

- 6 A. This proceeding be stayed in whole or in part pending resolution of the federal court  
7 action, *BNSF Railway Company v. City of Wenatchee*, United States District Court  
8 for the Eastern District of Washington, Case No. 2:22-cv-00263.  
9 B. Denial of the Petition because the City fails to establish a public safety justification  
10 for all of the City's proposed modifications.  
11 C. Dismissal of City's Petition with prejudice;  
12 D. Leave to amend this answer if necessary;  
13 E. For such further relief that the Court deems just and proper.

14 DATED this 15th day of November, 2022.

15 FOSTER GARVEY PC

16 /s/ Christopher G. Emch  
17 Christopher G. Emch, WSBA #26457  
18 Thomas F. Ahearne, WSBA #14844  
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*Attorneys for Respondent  
BNSF Railway Company*

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3 **CERTIFICATE OF SERVICE**

4 I hereby declare under penalty of perjury under the laws of the State of Washington that I  
5 caused a true and correct copy of the foregoing to be served via the methods below on this 15th  
6 day of November, 2022 on the following representatives for the parties of record:

7 ***Counsel for City of Wenatchee***

8 Steve D. Smith  
9 Davis, Arneil Law Firm, LLP  
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- via hand delivery  
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12 ***Representative for Staff of the Utilities  
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13 Jeff Roberson  
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18 ***For Washington Utilities  
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- via hand delivery  
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23 Executed at Seattle, Washington, on November 15, 2022.

24 /s/ Gabriela DeGregorio  
25 Gabriela DeGregorio, Legal Practice Assistant