

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THE BURLINGTON NORTHERN &
SANTA FE RAILWAY COMPANY,

Petitioner,

v.

SNOHOMISH COUNTY,

Respondent.

DOCKET NO. TR-010194

COMMISSION STAFF POSITION
ON CONTINUANCE

Staff position on continuance

Staff takes no position on Snohomish County's request for a continuance of the hearing in this matter except to point out that there is no hard and fast rule that environmental review must be completed prior to holding hearings on an adjudicated matter, although it is clearly favored to the extent it is practicable. The question presented by this motion for a continuance is really whether the Commission is willing to risk some inefficiency in the use of its resources (and in the County's expenditure of resources in making its case) in order to save the railroad some potentially significant time and expense in its planning.

Discussion

This continuance request begs the larger question of why BNSF would have the Commission and the parties adhere to the timing that the railroad has chosen for its petition.

BNSF should be required to fully state its reasons in the context of its opposition to this continuance request.

This petition is different than the usual petition for closure of a crossing in that it is tied closely together with the planned construction of a siding track at the location of the crossing. Given this posture, it is tempting to look at the issue before the Commission as whether the operational efficiency of the railroad in constructing its siding without a crossing through it outweighs the convenience and necessity of the road authority in maintaining its crossing at the location. But this is not the standard. Rather, the standard is whether the “public safety” (i.e., the elimination of the hazard to motorists presented by the at-grade crossing) outweighs the public convenience and necessity of keeping the crossing open. The relevant part of RCW 81.53.060 states:

any railroad company whose road is crossed by any highway, may file with the commission . . . its petition in writing, *alleging that the public safety requires* . . . the closing and discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing, or if not practicable, to change the crossing from grade, or to close and discontinue the crossing, the opening of [STET—“and open”?] an additional crossing for the partial diversion of travel, and praying that this relief maybe ordered.

While the statute is not a model of clarity, it makes clear that the only consideration before the commission is whether the public safety requires the closure. Staff suggests that this implies the weighing of the inherent danger of an at-grade crossing against the road authority’s need to keep the crossing open. See Dept. of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949).

It is not clear to Staff exactly what BNSF’s theory is in this case. BNSF may be asking the railroad to ask the Commission to assume the existence of a yet-to-be built-siding track at the location of the existing siding for purposes of applying the statutory standard of whether the

“public safety requires” the closure of the crossing. There is no reason Staff has been able to identify to conclude this is improper. The railroad also might go to hearing on the theory that, under present conditions, and without regard to the planned siding, the public safety requires the closure of the crossing. If the railroad’s theory is the latter, there may be less reason to tie environmental review of the siding construction together with environmental review of the closure of the crossing.

If the Commission is to err on the side of caution and treat the siding construction and the petitioned-for grade crossing closure as party of the same project within the meaning of SEPA, then it is necessary to decide how to share SEPA responsibility between the Commission and the County. This remains to be accomplished.

The Department of Ecology’s rules on SEPA do not preclude having a hearing prior to making a threshold determination. They do, however, express a preference for doing the environmental view as early as possible:

WAC 197-11-055 Timing of the SEPA process. (1) Integrating SEPA and agency activities. The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems.

(2) Timing of review of proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

(a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the environmental effects can be meaningfully evaluated.

(i) The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

(ii) Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.

(b) Agencies shall identify the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis.

Agencies may also organize environmental review in phases, as specified in WAC 197-11-060(5).

(c) Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC 197-11-070).

(d) A GMA county/city is subject to additional timing requirements (see WAC 197-11-310).

(3) Applications and rule making. The timing of environmental review for applications and for rule making shall be as follows:

(a) At the latest, the lead agency shall begin environmental review, if required, when an application is complete. The lead agency may initiate review earlier and may have informal conferences with applicants. A final threshold determination or FEIS shall normally precede or accompany the final staff recommendation, if any, in a quasi-judicial proceeding on an application. Agency procedures shall specify the type and timing of environmental documents that shall be submitted to planning commissions and similar advisory bodies (WAC 197-11-906).

(b) For rule making, the DNS or DEIS shall normally accompany the proposed rule. An FEIS, if any, shall be issued at least seven days before adoption of a final rule (WAC 197-11-460(4)).

(4) Applicant review at conceptual stage. In general, agencies should adopt procedures for environmental review and for preparation of EISs on private proposals at the conceptual stage rather than the final detailed design stage.

(a) If an agency's only action is a decision on a building permit or other license that requires detailed project plans and specifications, agencies shall provide applicants with the opportunity for environmental review under SEPA prior to requiring applicants to submit such detailed project plans and specifications.

(b) Agencies may specify the amount of detail needed from applicants for such early environmental review, consistent with WAC 197-11-100 and 197-11-335, in their SEPA or permit procedures.

(c) This subsection does not preclude agencies or applicants from preliminary discussions or exploration of ideas and options prior to commencing formal environmental review.

(5) An overall decision to proceed with a course of action may involve a series of actions or decisions by one or more agencies. If several agencies have jurisdiction over a proposal, they should coordinate their SEPA processes wherever possible. The agencies shall comply with lead agency determination requirements in WAC 197-11-050 and 197-11-922.

(6) To meet the requirement to insure that environmental values and amenities are given appropriate consideration along with economic and technical considerations, environmental documents and analyses shall be circulated and reviewed with other planning documents to the fullest extent possible.

(7) For their own public proposals, lead agencies may extend the time limits prescribed in these rules.

Staff looks forward to the opportunity to address these issues in greater depth at tomorrow's hearing on this matter.

DATED this 16th day of August, 2001.

CHRISTINE O. GREGOIRE
Attorney General

JONATHAN C. THOMPSON
Assistant Attorney General
Washington Utilities and
Transportation Commission
(360) 664-1225