

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

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| THE BURLINGTON NORTHERN) & SANTA FE RAILWAY) COMPANY,))) Petitioner,)) v.)) SNOHOMISH COUNTY,))) Respondent.)) |) | DOCKET NO. TR-010194 FIRST SUPPLEMENTAL ORDER; ORDER GRANTING MOTION FOR CONTINUANCE |
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1 **PREHEARING CONFERENCE:** This matter concerns a petition by the Burlington Northern & Santa Fe Railway Company (“BNSF”) for closure of the 156th Street N.E. at-grade crossing located in Snohomish County, north of Marysville, Washington. Evidentiary hearings are scheduled to begin on August 30, 2001. On August 13, 2001, respondent Snohomish County filed a Motion for Continuance in order to complete a State Environmental Policy Act (“SEPA”) review as lead agency. BNSF and intervenor Washington State Department of Transportation (“WADOT”) oppose the motion. The Commission convened a prehearing conference in this proceeding to provide parties an opportunity to present arguments and answer questions in Olympia, Washington, on August 17, 2001, before Administrative Law Judge Lawrence J. Berg.

2 **APPEARANCES:** Robert E. Walkley, Attorney at Law, Sammamish, Washington appeared for petitioner BNSF. Jason Cummings, Deputy Prosecuting Attorney, Civil Division, appeared for respondent Snohomish County. Jeffrey D. Stier, Assistant Attorney General, Olympia, Washington, appeared for intervenor WADOT. Jonathan C. Thompson, Assistant Attorney General, Olympia, Washington, appeared for Commission Staff (“Staff”).

3 **PROCEDURAL BACKGROUND:** BNSF’s petition to close the 156th Street N.E. crossing was filed on February 8, 2001. The Commission conducted an initial prehearing conference and the matter was scheduled for hearings beginning July 12, 2001. On June 25, 2001, petitioner BNSF requested that the hearing be continued due to an unanticipated delay in submission of a SEPA checklist to Commission Staff and other parties. On August 2, 2001, the Commission rescheduled the hearing to begin on August 30, 2001. A separate notice of public hearing was served on August 9, 2001.

4 Commission Staff initially determined that it would serve as lead agency for the SEPA review on July 11, 2001. On or about August 3, 2001, Snohomish County notified Commission Staff that it would assume lead agency status because it was the local agency responsible for issuing right-of-way and construction permits for the BNSF project. On August 9, 2001, Staff purported to transfer lead agency status to Snohomish County. Who should bear the responsibility of lead agency remains in dispute.

5 **DISCUSSION AND DECISION:** BNSF describes the immediate dispute as both simple and complex. BNSF states that the only matter pending before the commission is the railway's petition to close the 156th Street N.E. crossing. However, BNSF acknowledges that the resolution of pertinent issues is complicated by BNSF's concurrent plan to construct a railway siding. BNSF argues that the Commission has no jurisdiction over its siding construction plans, but also argues that the Commission should broadly consider the proposed siding project along with other relevant factors in taking final action. As part of its petition, BNSF filed prepared a SEPA checklist that included roadwork as part of the siding construction project.

6 BNSF and WADOT oppose Snohomish County's motion for continuance on several grounds: they dispute the transfer of lead agency status to Snohomish County; they argue that the SEPA review process need not precede evidentiary hearings and an initial order; they argue that a continuance will substantially inconvenience witnesses who are scheduled to testify at hearing; and they argue that a lengthy delay may cause considerable additional expense to its siding construction project.¹

7 BNSF's choice of two alternative sites for the siding project is largely dependent on the final action taken in this proceeding. BNSF's preferred site ("English south") is not feasible if the petition to close the crossing is denied. BNSF's alternative site ("English north") will likely require a more rigorous permit process because of its proximity to a fish-bearing waterway. Construction of a siding at the English north site must be completed during a defined time period that does not disrupt the fish reproduction cycle. Due to the additional time necessary to complete the permitting process and construction restrictions at the English north site, BNSF emphasizes its need for a timely final determination by the Commission on its petition. Thus, the railway strongly opposes the motion for continuance.

8 We agree with BNSF that the WAC rules do not preclude the completion of evidentiary hearings and entry of an initial order before the SEPA review process is completed. We also agree with BNSF that the circumstances surrounding the railway's petition deserve timely action. The essential issue to be resolved, however,

¹ BNSF and WADOT concur in arguments supporting their separate opposition to the motion for continuance, but for ease of reference further discussion will ascribe the arguments to BNSF.

is whether final Commission action will be expedited by proceeding with the scheduled evidentiary hearings prior to resolution of lead agency disputes and preparation of a threshold SEPA determination. We conclude, after careful review of all factors, that the hearing process will benefit from a short delay in beginning the evidentiary hearings.

- 9 The confusion regarding determination of lead agency status, including Snohomish County's licensing authority over the siding construction project, is a distraction from the matters at issue before the Commission. These disputes must be resolved and a final environmental determination made before agency action can occur. We believe, at a minimum, that the lead agency should make a threshold SEPA determination prior to beginning the evidentiary hearings. A short continuance will allow the parties an opportunity to consider their positions carefully and to define their roles in this proceeding without the pressure of preparing for litigation. It will reveal whether BNSF will appeal the lead agency designation. Further, parties will be better prepared to address substantive issues during the evidentiary hearings. Finally, because no agency action may be taken in any event, the delay does not extend the time for this agency's final decision.
- 10 We note that a prior continuance was initiated by BNSF, and we find that an additional brief continuance will minimally impact BNSF's long-term project development. To mitigate any adverse impact caused by this brief delay in the proceedings, The Commission will expedite entry of an initial order and the review, if review is sought.
- 11 Evidentiary hearing dates, including a separately scheduled public hearing, will be rescheduled to occur in approximately six weeks. If SEPA issues remain unresolved at that time, we will proceed with hearings separate from the SEPA process. To assist the Commission with rescheduling, the parties must notify the Commission no later than August 24, 2001, of any conflicts that exist on the potential hearing dates of September 24, 2001, through October 5, 2001.
- 12 A separate notice rescheduling the public hearing will be served to parties and interested persons. The Commission requests that Snohomish County voluntarily post a notice regarding the canceled public hearing at the Lion's Hall hearing site in Forest Park on Thursday, August 30, 2001, and that a county representative be present on that date, from 6:00 p.m. to 7:00 p.m., to advise any members of the public who do not receive prior notice that the public hearing is cancelled.

ORDER

13 IT IS ORDERED That the motion for continuance is granted, and the prehearing conference date of August 29, 2001, and the hearing date of August 30, 2001, are cancelled.

DATED at Olympia, Washington, and effective this ____ day of August, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

LAWRENCE J. BERG
Administrative Law Judge