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WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, by JEFF STIER, Assistant Attorney
General, Post Office Box 40113, Olympia, Washington
98504. (Via bridge line.)

Kathryn T. Wilson, CCR
Court Reporter

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INDEX OF EXHIBITS

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JUDGE WALLIS: Let's be on the record, please. This is a prehearing conference in the matter of Commission docket number TR-990656, which is the petition of the Burlington Northern and Santa Fe Railway Company for modification of an order regulating the speed of passenger and freight trains in Puyallup, Washington.

This conference is being held September 20th of the year 2001 at Olympia, Washington before Administrative Law Judge C. Robert Wallis. Judge Moss, who is the assigned presiding judge for this proceeding, is unable to be with us today and asked me to convene the proceeding in his stead. At this time, I would like to call for appearances and begin with persons who are present in the hearing room and with the petitioner, the Burlington Northern and Santa Fe Railway Company.

MR. WALKLEY: Thank you, Your Honor. My name is Robert E. Walkley, attorney at law, 20349 Northeast 34th Court, Sammamish, Washington, 98074-4319. Telephone and fax number, (425) 868-4846. E-mail is rewalkley@earthlink.net. I'm representing the Burlington Northern and Santa Fe Railway.

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1 JUDGE WALLIS: For the City of Puyallup?
2 MR. FITZPATRICK: Thank you, Your Honor. My
3 name is Arthur Fitzpatrick. I represent the City of
4 Puyallup, city attorney. My address is 218 West
5 Pioneer, Puyallup, Washington, 98371. Telephone number
6 is (253) 770-3324, and fax number is (253) 770-3352.
7 JUDGE WALLIS: Commission staff?
8 MR. THOMPSON: This is Jonathan Thompson,
9 assistant attorney general. My address is 1400 South
10 Evergreen Park Drive Southwest, Olympia, 98504, and my
11 telephone number is (360) 664-1225.
12 JUDGE WALLIS: For Sound Transit?
13 MR. WAGNER: Good morning, Your Honor.
14 Jordan Wagner, legal counsel for Sound Transit, along
15 with Melissa Flores. Our address is 401 South Jackson
16 Street, Seattle, Washington, 98104. My telephone
17 number is (206) 398-5224.
18 JUDGE WALLIS: For Washington State
19 Department of Transportation?
20 MR. STIER: My name is Jeff Stier, assistant
21 attorney general, representing Washington State
22 Department of Transportation public rail division, and
23 my address is P.O. Box 40113, Olympia, Washington,
24 98504. My phone number is (360) 753-1623.
25 JUDGE WALLIS: Prior to going on the record

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1 this morning, we did discuss with the parties a
2 procedural status of this matter and the documents that
3 recently have been filed and presented. The City by
4 Mr. Fitzpatrick on August 20 of this year filed with
5 the Commission a memorandum of understanding between
6 the City and the Burlington Northern and Santa Fe
7 Railway Company, which it believes will resolve the
8 issues in this proceeding, and based upon the
9 presentation of this document, the City wishes to
10 withdraw its request for an adjudication; is that
11 correct, Mr. Fitzpatrick?

12 MR. FITZPATRICK: That is correct.

13 JUDGE WALLIS: In addition, the parties have
14 jointly presented this morning a draft Commission order
15 which they've titled "Proposed Order Granting Petition"
16 by which they propose that the Commission resolve the
17 issues in this proceeding by accepting the Memorandum
18 of Understanding; is that correct?

19 MR. THOMPSON: That's essentially correct;
20 although, there are a couple of other conditions that
21 were agreed to between BNSF and Staff that are in
22 addition to those set out in the Memorandum of
23 Understanding.

24 JUDGE WALLIS: Would you describe those very
25 briefly for the record, please?

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1 MR. THOMPSON: They are set out, actually, in
2 the Proposed Order Granting Petition, and the first
3 concerns that the Railroad would be permitted to
4 observe existing speed limits until such times as the
5 conditions in the MOU are met as head end restrictions
6 as opposed to rear end restrictions.

7 JUDGE WALLIS: On the engine instead of the
8 caboose?

9 MR. THOMPSON: Right. In other words, the
10 speed is measured at a point -- once the train passes
11 the point, the engine speed can be increased is the
12 idea rather than the whole train having to pass the
13 point. The other concerns the installation of a
14 repeater traffic signal at 15th Street Southeast.
15 That's also described on Page 3 of that proposed order.

16 There are also stipulations concerning the
17 Railroad giving advance notice to both the City and the
18 Commission in the event that it increases speeds above
19 those that it's indicated it wants authority to operate
20 at this point, and those are set out in further detail
21 in the proposed order as well.

22 JUDGE WALLIS: Mr. Walkley?

23 MR. WALKLEY: It's a little confusing.
24 Actually, the current head end restrictions are being
25 changed to rear end restrictions; is that right?

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1 MR. ROWSWELL: It's the other way around.

2 MR. WALKLEY: The net result is that trains
3 will be able to proceed through crossings at a higher
4 speed once they've passed the -- Mike, could you
5 explain exactly what it is?

6 JUDGE WALLIS: Mr. Rowswell, would you
7 identify yourself for the record, please?

8 MR. ROWSWELL: I'm Mike Rowswell. I'm the
9 rail safety manager here at the Commission, Commission
10 staff --

11 JUDGE WALLIS: Is this evidence as opposed to
12 representation? I just read the Supreme Court case
13 that says the Commission cannot consider evidence that
14 is not sworn.

15 MR. ROWSWELL: It's not my decision. It's an
16 explanation.

17 JUDGE WALLIS: Why don't we dot all our I's
18 and cross all our T's and ask you to raise your right
19 hand.

20 (Witness sworn.)

21 JUDGE WALLIS: Please proceed.

22 MR. ROWSWELL: Currently the way the orders
23 are written and understood by all parties on speeds
24 through Puyallup and other places is that the train
25 must proceed at the speed indicated, say, 30 miles an

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1 hour if that is it, through the entire train until that
2 entire train passes, say, a specific point, a crossing.

3 The proposal made by Burlington Northern and
4 Santa Fe Railway and accepted by Staff and proposed by
5 Staff is that as soon as the head end of the train, the
6 locomotive of the train, passes a crossing specific
7 point, the train may then speed up to the next higher
8 speed that's allowed. So that's the difference that's
9 being proposed.

10 MR. WALKLEY: I concur, Your Honor. I was
11 momentarily confused by it myself. The other thing I
12 would just comment on is that the order, of course,
13 speaks for itself, the proposed order. It is a result
14 of several weeks of careful work and negotiation
15 between the parties, but the other thing to note is
16 that the order contemplates a phased-in approach to
17 speed increases, but with the additional agreement by
18 the Railroad that it will notify Commission staff as
19 each of these phases, the work of each of the phases is
20 completed so that they can verify that the signals or
21 other installations are in and function as intended.
22 That's another protection.

23 I might also add just simply for the record
24 that this proposed order constitutes an agreed
25 settlement also between Burlington Northern Santa Fe

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1 and the Utilities Commission in terms of the continuing
2 discussions about the extent of the Commission's
3 jurisdiction in the speed area given federal
4 preemption. So this not only represents an agreement
5 between the Railroad and the City represented by the
6 Memorandum of Understanding, but it also represents a
7 proposal for the commissioners as an agreement between
8 the Commission and the Railroad as to how to settle any
9 potential controversies of this case concerning the
10 limits of jurisdiction.

11 JUDGE WALLIS: Does the order purport to
12 affect others and other proceedings?

13 MR. WALKLEY: No, Your Honor.

14 JUDGE WALLIS: Mr. Wagner, does Sound Transit
15 concur in the proposal that's been discussed?

16 MR. WAGNER: Yes, we do.

17 JUDGE WALLIS: Mr. Stier, is that true also
18 for WSDOT?

19 MR. STIER: Yes, it is.

20 JUDGE WALLIS: I'd like to mark as Exhibit 1
21 for identification a five-page document, the first page
22 of which is a letter on letterhead of the City of
23 Puyallup, office of the city attorney, dated August
24 16th, 2001, and filed with the Commission on August 20,
25 2001. It purports to be signed by Mr. Arthur

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1 Fitzpatrick, Puyallup city attorney. Mr. Fitzpatrick,
2 is that your signature?

3 MR. FITZPATRICK: That is my signature, Your
4 Honor.

5 JUDGE WALLIS: Is there objection to
6 receiving this as Exhibit 1? Let the record show there
7 is no response and it is received.

8 I'm marking as Exhibit 2 for identification a
9 document consisting of five pages, the first page of
10 which is entitled "Docket No. TR-990656, Proposed Order
11 Granting Petition." This is the document the parties
12 have discussed in which they suggest language for the
13 Commission to use in accepting the Memorandum of
14 Understanding and imposing conditions that have been
15 agreed between the Commission staff and the Railroad;
16 is that correct?

17 MR. THOMPSON: That's correct, Your Honor. I
18 would also note that it was pointed out to me by our
19 court reporter that our caption may not be the correct
20 caption for this case, but with that modification, I
21 think this represents what you've indicated.

22 JUDGE WALLIS: We will endeavor to correct
23 any minor technical matters prior to presenting it to
24 the Commission for their potential signature. Is there
25 objection to receiving this document? Let the record

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1 show there is no response, and it is received as
2 Exhibit 2.

3 At this time, I would like to ask the parties
4 for a brief description of why in their view it is both
5 consistent with pertinent law and consistent with the
6 public interest that the Commission accept the proposal
7 that's being presented and enter the order that's been
8 proposed. Again, let's begin with the petitioner;
9 Mr. Walkley?

10 MR. WALKLEY: Thank you, Your Honor. The
11 Memorandum of Understanding and the proposed order were
12 both negotiated by people working very hard to work
13 together to make certain improvements to the crossings
14 specified in the Memorandum of Understanding. The
15 entire project is intended to improve the safety but
16 more directly to improve the efficiency of the rail
17 lines traveling through the City of Puyallup.

18 As the Railroad continues to increase the
19 utilization of its corridor, Sound Transit adding
20 service as well as the normal freight service it's
21 handled, it was necessary to do a thorough job among
22 various parties of various interests to make sure that
23 these proposed speed increases were done in a manner to
24 which all of the parties could work together to
25 improve. For example, it's understood, for instance,

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1 that the City and the Railroad are working together on
2 what's called the 15th Street intertie project, and
3 that's a case where the City and the Railroad are
4 working together to improve a traffic signal down on
5 15th Southeast.

6 It is my belief that both the Memorandum of
7 Understanding and the proposed order benefit the public
8 as well as the railroad company and the others here
9 today in several respects. One is that instead of
10 engaging in potentially very expensive litigation both
11 between the Railroad and the City as well as
12 potentially the Railroad and the Commission over such
13 issues as jurisdiction or whether something is or is
14 not a local safety hazard and other matters which could
15 potentially take years, the parties have found a way to
16 protect all of their interests and at the same time get
17 the job done. So it is the Burlington Northern
18 Santa Fe view that we've received splendid cooperation
19 both from the City of Puyallup and the Commission
20 staff, and we wish to thank them for that cooperation.

21 JUDGE WALLIS: Thank you, Mr. Walkley.
22 Mr. Fitzpatrick?

23 MR. FITZPATRICK: Thank you. The City's
24 position is that this does benefit the City and the
25 community of Puyallup. Most concerns were regarding

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1 safety. There are a number of issues that the
2 Memorandum of Understanding addresses. The City is
3 currently working on an above-grade crossing project,
4 and BNSF has agreed to cooperate and commit sums of
5 money within this Memorandum of Understanding which
6 basically relieves the City of having to go through a
7 more formal and separate process for that issue.

8 In addition, the Memorandum of Understanding
9 addresses requirements of BNSF and Operation Lifesaver,
10 and the phasing of the train speeds, it's the City's
11 position, will give the community some comfort and
12 understanding. The train speeds won't be increasing
13 from 30 miles an hour to 50 miles an hour overnight.
14 They will phase in, and they will understand and better
15 recognize that those train speeds are increasing.

16 It's the City's position that the Memorandum
17 of Understanding addresses the issues of the citizens
18 and the City's elected officials. After numerous
19 public hearings and public comment, the city counsel
20 was comfortable with the Memorandum of Understanding,
21 and it appears that the proposed order incorporates all
22 the major portions of that Memorandum of Understanding
23 and expands upon them to some degree. So it's the
24 City's position that this does accomplish and take care
25 of the issues that the City of Puyallup had.

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1 JUDGE WALLIS: Thank you. Commission staff?

2 MR. THOMPSON: Your Honor, I might just
3 address a matter that hasn't been specifically
4 addressed by either of the two earlier comments, and
5 that is the position that Staff has taken to stipulate
6 to vacation of prior orders, and the reason we think
7 that is appropriate is because of the state of the law.
8 With federal preemption, the Commission does have
9 authority under its own state statutes to fix speed
10 limits within city limits, but that is subject to the
11 preemption by the Federal Railroad Safety Act where the
12 Federal Railroad Administration has seen fit to
13 regulate in the area of safety, and there are speed
14 limits set by the Federal Railroad Administration for
15 various classes of track.

16 The Commission recently codified the burden
17 of proof for cases such as this at WAC 480-62-155, and
18 basically, that provides that when the railroad
19 petitions the Commission for a speed increase beyond an
20 existing speed order, it need only show that it would
21 be allowed to go faster under federal regulation, and
22 at that point, the burden shifts to either Staff or the
23 City, for example, to prove that there is an
24 exceptional circumstance, something that is referred to
25 in statute as essentially a local safety hazard that

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1 necessitates the need for a more stringent state
2 standard, and that's the context in which these
3 negotiations took place. So the Railroad has made its
4 stipulations to mitigate certain rail-related hazards
5 in that setting.

6 The additional conditions that Staff has
7 agreed to probably need a little bit of additional
8 explanation. I think that the Staff's feeling on
9 changing the existing speed restrictions that will stay
10 in place until certain things are accomplished by the
11 Railroad, the Staff has stipulated to allow those to be
12 observed as head end restrictions rather than rear end
13 restrictions, and the reason for that is basically, I
14 guess, the hazard presented by the train is at its head
15 end rather than its rear end, so there is effectively
16 no detriment to safety in allowing that change from
17 Staff's point of view.

18 Another important matter was that if the
19 railroads do for some reason get the authority, federal
20 authority to operate at a higher speed limit than they
21 are currently indicating, they have agreed to alert the
22 City as well as the Commission of that fact, and that
23 would provide the Commission or the City the
24 opportunity to reassess whether conditions were more
25 stringent and make a case for that if they see fit, so

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1 we see that as being consistent with the public
2 interest, and that's Staff's view of this settlement.

3 JUDGE WALLIS: Thank you, very much.

4 Mr. Wagner, do you have anything to add?

5 MR. WAGNER: Just a little. We concur with
6 the comments of BNSF and Puyallup. We believe that the
7 limits are within the established limits set by the
8 Federal Railroad Administration, and the settlement
9 will result in increased efficiency and safety for mass
10 transit, which we believe is also consistent with the
11 public interest.

12 JUDGE WALLIS: Mr. Stier?

13 MR. STIER: I would like to concur with
14 statements of Sound Transit and BNSF, and it's the
15 position of DOT that this settlement benefits the
16 public in intercity travel while addressing safety
17 issues and efficiency issues, and most importantly, it
18 addresses local concerns and federal jurisdictional
19 issues, and I think it's a really good step toward
20 dealing with this issue. I think we made a lot of
21 progress in this process. I think everybody has worked
22 really hard to do that, and I do appreciate it very
23 much.

24 JUDGE WALLIS: Thank you, Mr. Stier.

25 Mr. Walkley?

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1 MR. WALKLEY: Your Honor, just a minor
2 correction or clarification for the record. The order
3 provides that the Railroad will give notification to
4 the Commission staff for various times, and it was
5 contemplated that Staff would notify the City, so there
6 is no direct notification from the Railroad to the
7 City, but there is a provision in various times given
8 in the proposed order during which notification takes
9 place.

10 In addition, the City and the Railroad agreed
11 on times that are reflected in this order before which
12 certain things could be accomplished. That's merely a
13 minor comment on the earlier comments.

14 JUDGE WALLIS: Mr. Fitzpatrick and
15 Mr. Thompson, do you agree with that statement?

16 MR. THOMPSON: Yes, Your Honor. I was in
17 error on that.

18 MR. FITZPATRICK: Exhibit A does incorporate
19 some specific dates, for the most part, for the
20 increases, so the City is on notice of the
21 implementation dates of those.

22 JUDGE WALLIS: By Exhibit A, you mean, the
23 memorandum?

24 MR. FITZPATRICK: Yes, Exhibit A to the
25 memorandum.

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1 JUDGE WALLIS: The parties waive an initial
2 order and agree to the presentation of the proposal and
3 the record in this matter to the Commission for the
4 Commission's decision; is that correct?

5 MR. WALKLEY: Yes, Your Honor.

6 MR. FITZPATRICK: It is, Your Honor.

7 JUDGE WALLIS: Mr. Wagner, Mr. Stier, is that
8 correct?

9 MR. WAGNER: Yes, that is correct.

10 JUDGE WALLIS: The process that we anticipate
11 is that the Commission will consider establishing a
12 time and place for members of the public to comment on
13 this. That may be done during a Commission open
14 meeting. It may be done in an adjudicative format or
15 open meeting format, which are very similar in nature.
16 We will consult with the commissioners as to the exact
17 process. Is that acceptable to the parties?

18 MR. WAGNER: Yes.

19 MR. WALKLEY: Yes.

20 MR. FITZPATRICK: Yes.

21 MR. THOMPSON: Yes.

22 JUDGE WALLIS: Is there anything else the
23 parties would like to add to correct or supplement
24 anything that has been said this morning? Let the
25 record show there is no response.

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1 I want to add to the congratulations and
2 words of appreciation that the parties have expressed
3 regarding each other. On behalf of the Commission, we
4 truly appreciate the parties' efforts and the success
5 of those efforts in resolving the issues. It does
6 appear certainly that the parties believe that this
7 proposal does satisfy the public interest as well as
8 the requirements of law, and we are expressing those
9 congratulations on behalf of the Commission.

10 With that, we will conclude today's session,
11 and the parties and the public will receive notice of
12 any further proceedings in this matter. Thank you very
13 much.

14 (Prehearing conference concluded at 10:27 a.m.)

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