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 1 BEFORE THE WASHINGTON STATE

 2 UTILITIES AND TRANSPORTATION COMMISSION

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 4 BNSF RAILWAY COMPANY, ) Docket TR-140382 and

 ) Docket TR-140383

 5 Petitioner, ) Pages 39 - 52

 )

 6 v. )

 )

 7 YAKIMA COUNTY, )

 )

 8 Respondent. )

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 TELEPHONIC PREHEARING CONFERENCE - VOLUME II

10

 Pages 39 - 52

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 ADMINISTRATIVE LAW JUDGE RAYNE PEARSON

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 2:35 P.M.

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 NOVEMBER 4, 2014

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 1 OLYMPIA, WASHINGTON, NOVEMBER 4, 2014

 2 2:35 P.M.

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 5 P R O C E E D I N G S

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 7 JUDGE PEARSON: Let's be on the record in

 8 consolidated dockets, TR-140382 and TR-140383, captioned: BNSF

 9 Railway Company v. Yakima County.

10 Today is Wednesday, November 4, 2014, at

11 approximately 2:35 p.m., and we are here for a telephonic

12 prehearing conference to establish a new procedural schedule

13 with an evidentiary hearing in April 2015, as well as to hear

14 Staff's motion to withdraw from this proceeding.

15 My name is Rayne Pearson, and I am the administrative

16 law judge presiding over this case. Commission Staff is present

17 with me in the hearing room.

18 Mr. Oshie, if you want to briefly give an appearance?

19 MR. OSHIE: Certainly, Judge.

20 My name is Patrick Oshie, representing Commission

21 Staff.

22 JUDGE PEARSON: Okay. And if the representative for

23 BNSF, Mr. Montgomery, if you could just introduce yourself on

24 the record.

25 MR. MONTGOMERY: Yeah. This is Tom Montgomery on

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 1 behalf of BNSF Railway Company.

 2 JUDGE PEARSON: Okay. Can you speak up a little bit,

 3 Mr. Montgomery?

 4 MR. MONTGOMERY: I sure can, Your Honor.

 5 Tom Montgomery on behalf of BNSF Railway.

 6 JUDGE PEARSON: Okay. And the representatives for

 7 Yakama Nation, if you could introduce yourselves.

 8 MR. SEXTON: Thank you, Your Honor. This is Joe

 9 Sexton on behalf of Yakama Nation.

10 MR. JONES: And this is Ethan Jones on behalf of the

11 Yakama Nation.

12 JUDGE PEARSON: Okay. And is there anyone on the

13 bridge line representing Yakima County?

14 Okay. Hearing nothing, we'll proceed for now.

15 Hopefully, someone from the County will join us.

16 So, first, we'll take up Staff's motion to withdraw

17 from the proceeding.

18 Mr. Oshie, when you're ready.

19 MR. OSHIE: Thank you, Judge.

20 What Staff has requested is that it be able to

21 withdraw from this proceeding, and Staff proffers two of -- you

22 know, really two reasons for that. One, of course, is that

23 Staff is very, very busy right now and is unable, it believes,

24 to spend the time it feels necessary to provide information and

25 evidence sufficient for the -- for it in order to provide a

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 1 record for this proceeding.

 2 The second reason is that Staff, understanding that

 3 Yakima County is involved in this case and the Yakama Nation is

 4 involved in this case, it believes that the parties are

 5 competent, they're represented by counsel, and that they will

 6 provide a sufficient record for this Court to make a decision.

 7 So those are the reasons Staff is asking to withdraw.

 8 I think largely the reason is that it believes it unable to

 9 devote the time necessary to this case.

10 JUDGE PEARSON: Okay. Thank you.

11 MR. OSHIE: Mm-hm.

12 JUDGE PEARSON: And it's my understanding that

13 although Staff will no longer be a party to the proceeding,

14 Staff will be able to advise the Commission with this

15 proceeding; is that correct?

16 MR. OSHIE: Yeah. Staff would be available to advise

17 the Commission. I think its participation with the judicial

18 side of the Commission would be, I think, largely a matter of

19 policy that the Commission has really employed when making these

20 decisions.

21 JUDGE PEARSON: Okay. Thank you.

22 Do any of the parties on the bridge line have an

23 objection to the Staff's motion, or any comments that they want

24 to make?

25 MR. SEXTON: This is Joe Sexton for Yakama Nation.

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 1 Your Honor, we have no objection to the motion.

 2 Thank you.

 3 JUDGE PEARSON: Thank you.

 4 Mr. Montgomery?

 5 MR. MONTGOMERY: On behalf of BNSF Railway Company,

 6 Your Honor, I would only comment that BNSF always values the

 7 Staff's input and competence, and we would wish them well and we

 8 will miss them and we do not oppose the motion.

 9 I do, however, have a question of what the Staff's

10 being available to advise the Commission would look like as a

11 practical or logistical matter.

12 (Reporter interruption for clarification.)

13 JUDGE PEARSON: Can you speak up and repeat that?

14 The court reporter is having trouble hearing what you said.

15 MR. MONTGOMERY: Yeah. I'm really sorry. I need

16 Mr. Jones' speakerphone, I think.

17 BNSF will miss the Staff. We always value and

18 appreciate Staff's input; however, BNSF does not oppose the

19 motion.

20 However, I did say that I wonder when Staff -- when

21 you ask if Staff will be available to advise the Commission,

22 what that would look like as a practical and logistical matter.

23 JUDGE PEARSON: Okay. Mr. Oshie?

24 MR. OSHIE: Yes. Thank you, Judge.

25 Well, as I noted, Mr. Montgomery, I believe that what

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 1 the Staff would be willing to do is to provide its expertise to

 2 the Court where it comes down to matters of how similar cases

 3 have been decided, the policies that have been employed that the

 4 Commission will make in these decisions.

 5 Staff does not believe that it will take a lot of

 6 time in order to do that, and it's only as necessary as the

 7 Court would feel necessary. It's not something that we would

 8 insert ourselves or ask to insert ourselves in this process.

 9 We're available if the Court believes that it would be helpful

10 for it to make a decision.

11 JUDGE PEARSON: Mr. Montgomery, did that address your

12 question?

13 MR. MONTGOMERY: Yeah, it does. I assume that would

14 be something done in writing, then? The Court would enter an

15 order or some other directive asking for the Staff's assistance

16 in some particular matter, perhaps, or is it ex parte? I'm just

17 wondering how it looks or how it plays out.

18 MR. OSHIE: Well, we haven't -- Mr. Montgomery, this

19 is Pat Oshie again.

20 We really haven't considered the mechanism by which

21 Staff would become involved in the decision-making process along

22 with Judge Pearson.

23 I suppose if you would like notice of Staff's

24 participation in a very -- are you thinking in a general way

25 just to know when Staff is involved?

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 1 MR. MONTGOMERY: I guess I'm asking what Staff and

 2 the Commission had in mind. I haven't encountered it before, so

 3 I'm simply asking how --

 4 MR. OSHIE: Mm-hm.

 5 MR. MONTGOMERY: -- as you say, what the mechanism

 6 is.

 7 JUDGE PEARSON: One moment, Mr. Montgomery.

 8 Mr. Montgomery, when Staff is not a party to a

 9 proceeding, they frequently advise the Commission with respect

10 to policy matters and things of that nature.

11 MR. MONTGOMERY: Thank you, Your Honor.

12 JUDGE PEARSON: Okay. Since there were no objections

13 to Staff's motion, that motion to withdraw is granted.

14 And that brings us next to the schedule, and hearing

15 dates that are available are the week of -- any day the week of

16 April 13th, any day of the week of April 20th, as well as April

17 27th, 28th, and 29th.

18 Did the parties have a preference for any of those

19 dates?

20 MR. SEXTON: Your Honor, this is Joe Sexton on behalf

21 of the Yakama Nation. The parties -- I see the parties did meet

22 and confer pursuant to the Court's recommendation, and we had

23 some conflicts that unfortunately we weren't able to resolve.

24 On behalf of Yakama Nation, any of the dates listed

25 were pretty much wide open in April, so the Yakama Nation is

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 1 okay with any day in the two weeks the Court just referenced, as

 2 well as April 27, 28th, and 29. I think it's going to be up to

 3 BNSF and the County to flush through their schedules and resolve

 4 any conflicts they might have.

 5 JUDGE PEARSON: Okay. And, Mr. Montgomery, what

 6 dates would work for BNSF?

 7 MR. MONTGOMERY: Given that I have a trial starting

 8 April 20th, I guess I would prefer -- and it wouldn't last --

 9 oh, boy. It shouldn't last, I guess is a better choice of

10 words, a week.

11 I guess the 27th, 28th -- or I'd say 28 and 29 would

12 be my preference.

13 JUDGE PEARSON: Okay. Well, we can schedule the

14 hearing. It was scheduled for two days, so I presume we're

15 going to want to again schedule it for two days. And the 28th

16 and the 29th are fine with my calendar, so we can go ahead and

17 set the hearing for those two days.

18 And do the parties wish to set a date or a date range

19 for a settlement conference here today, or do you prefer to work

20 that out amongst yourselves?

21 MR. SEXTON: Your Honor, this is Joe Sexton, again,

22 for the Yakama Nation.

23 We don't have a preference either way, I guess. We

24 may benefit from some additional discovery before engaging in a

25 settlement conference, so I guess the one preference I would say

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 1 that the Nation does have is to push the entire schedule out

 2 proportionately with respect to the new hearing date.

 3 JUDGE PEARSON: Yes, that's what I plan to do.

 4 MR. SEXTON: Thank you, Your Honor.

 5 So we could have the settlement conference, I guess,

 6 at a later date.

 7 JUDGE PEARSON: Okay. I can leave that up to the

 8 parties, too. I don't need to set one in the schedule.

 9 MR. SEXTON: Okay.

10 JUDGE PEARSON: But the schedule that I have based on

11 the new hearing dates is prefiled testimony due on Wednesday,

12 December 31, 2014. Response testimony due Friday, February 13,

13 2015, with rebuttal and cross-testimony for all parties due on

14 Friday, March 13, 2015. And hearing dates of April 28th and

15 29th, and then, finally, the simultaneous post-hearing briefs

16 due Monday, June 1, 2015.

17 Do those dates work for the parties?

18 MR. MONTGOMERY: I believe so, Your Honor.

19 MR. SEXTON: Your Honor, they work for Yakama Nation.

20 MR. MONTGOMERY: And BNSF as well, Your Honor.

21 JUDGE PEARSON: Okay. Thank you.

22 So we will reserve a room at the Commission for both

23 days of the hearing on the 28th and 29th. It's up to the

24 parties to find a facility in Yakima to host the hearing, and if

25 you have not secured a space and notified me of that location by

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 1 the date that rebuttal and cross-testimony is due, which is

 2 Friday, March 13, 2015, we will hold both the evidentiary and

 3 the public comment hearings here at the Commission's

 4 headquarters in Olympia.

 5 So please make sure that you notify me directly if

 6 and when you secure a location, okay?

 7 MR. SEXTON: Thank you, Your Honor. We will be sure

 8 to notify the Court.

 9 And I just wanted to clarify, I believe previously

10 that the public hearing was to be set at some location reserved

11 in Toppenish, Washington.

12 Am I mistaken?

13 (Reporter interruption for clarification.)

14 JUDGE PEARSON: He said "Toppenish, Washington."

15 I'm not aware of that. Let me see if that's in here.

16 Just give me one moment, please.

17 MR. SEXTON: Thank you, Your Honor.

18 MR. MONTGOMERY: Mr. Jones, that rings a bell with me

19 as well. Tom Montgomery, BNSF Railway.

20 Did the County offer up some sort of accommodation?

21 JUDGE PEARSON: What I see in the prehearing

22 conference order is that a separate notice will be issued

23 setting forth the specific location in Yakima County where the

24 public comment hearing will be held and confirming the date and

25 time. And same with the evidentiary hearing. The separate

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 1 notice will be sent out at a designated location in Yakima

 2 County, so it doesn't specifically say Toppenish.

 3 MR. SEXTON: Joe Sexton again for Yakama Nation.

 4 That makes sense, Your Honor. Toppenish is within the County,

 5 and Toppenish is -- the reason I ask that, I think the parties

 6 had that understanding. It may have not made it into any

 7 written memorialization in the previous proceedings. But

 8 Toppenish is the closest municipality, I think, to the areas

 9 potentially impacted by the issues at hand.

10 JUDGE PEARSON: Okay.

11 MR. SEXTON: So I think that makes sense, and I thank

12 you for that.

13 (Reporter interruption for clarification.)

14 JUDGE PEARSON: Can you repeat that? I'm sorry. The

15 court reporter is having trouble hearing on the bridge line.

16 MR. SEXTON: Yes, Your Honor. This is Joe Sexton. I

17 think the parties -- I'm informed by my co-counsel that the

18 parties had discussed having the hearing in Toppenish,

19 Washington, because that's the closest municipality to the areas

20 potentially affected by the closures at issue in this matter.

21 Since Toppenish is in Yakima County, that makes sense

22 that whatever was reduced to writing references the County, and

23 then that I assume the parties will just work amongst ourselves

24 to set the hearing at the most convenient place.

25 JUDGE PEARSON: Okay. That sounds good.

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 1 Okay. Is there anything else we need to address

 2 while we're here today?

 3 MR. SEXTON: I have nothing on behalf of Yakama

 4 Nation, Your Honor.

 5 JUDGE PEARSON: Thank you.

 6 Mr. Montgomery?

 7 MR. MONTGOMERY: No, other than clarification that

 8 the parties will still have the obligation by March the 13th to

 9 advise the Court what alternative arrangements have been made,

10 correct?

11 JUDGE PEARSON: Correct.

12 MR. MONTGOMERY: Okay. Whether it's Toppenish or

13 Yakima itself or whatever the parties can agree to?

14 JUDGE PEARSON: Correct.

15 MR. MONTGOMERY: Thank you.

16 JUDGE PEARSON: Okay. Thank you.

17 I will issue an order reflecting what we discussed

18 here today, and we are adjourned. Thank you.

19 MR. SEXTON: Thank you, Your Honor.

20 MR. MONTGOMERY: Thank you very much.

21 (Proceeding concluded at 2:48 p.m.)

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 1 C E R T I F I C A T E

 2

 3 STATE OF WASHINGTON )

 ) ss

 4 COUNTY OF KING )

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 6 I, SHELBY KAY K. FUKUSHIMA, a Certified Shorthand Reporter

 7 and Notary Public in and for the State of Washington, do hereby

 8 certify that the foregoing transcript is true and accurate to

 9 the best of my knowledge, skill and ability.

10 IN WITNESS WHEREOF, I have hereunto set my hand and seal

11 this 13th day of November, 2014.

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 SHELBY KAY K. FUKUSHIMA, CCR

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16 My commission expires:

 June 29, 2017

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