

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY,	)	DOCKET TR-090121
	)	
Petitioner,	)	ORDER 01
	)	
v.	)	PREHEARING CONFERENCE ORDER
	)	
SNOHOMISH COUNTY,	)	NOTICE OF STATUS CONFERENCE
	)	<b>(Set for March 24, 2009, at 2:30 p.m.);</b>
Respondent.	)	NOTICE OF HEARING
	)	<b>(Set for March 30-31, 2009, at 9:00 a.m.);</b>
	)	NOTICE OF PUBLIC COMMENT HEARING
	)	<b>(Set for March 30, 2009, at 6:00 p.m.)</b>
.....	)	

1     **NATURE OF PROCEEDING.** Docket TR-090121 involves a petition by Burlington Northern Santa Fe Railway Company (BNSF) to abandon and close to public use a railroad-highway grade crossing located at Logen Road, Stanwood, Snohomish County, WA (US DOT #084713P) in accordance with Revised Code of Washington (RCW) 81.53.060.

2     **CONFERENCE.** The Washington Utilities and Transportation Commission (Commission) issued a Notice of Prehearing Conference on Tuesday, January 26, 2009, and subsequently convened a prehearing conference in this docket at Olympia, Washington, on Friday, February 13, 2009, before Administrative Law Judge (ALJ) Adam E. Torem.

3     **APPEARANCES.** Bradley Scarp and Kelsey Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represent BNSF. Justin Kasting and Matt Otten, Deputy Prosecuting Attorneys, Everett, Washington, represent Snohomish County.<sup>1</sup> Lynn Logen, *pro se*, Bellevue, Washington, represents himself. Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the

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<sup>1</sup> At the prehearing conference, Snohomish County confirmed that the Logen Road grade crossing does not lie within the urban growth boundary limits of the City of Stanwood.

Commission's regulatory staff ("Commission Staff" or "Staff").<sup>2</sup> Contact information provided at the conference for the parties' representatives is attached as Appendix A to this Order.

- 4 **ISSUES RAISED BY PETITION; BURDEN OF PROOF.** RCW 81.53.060 allows any railroad company whose road is crossed by any highway to file a petition alleging that "the public safety requires . . . the closing or discontinuance of an existing highway crossing" and requesting closure. BNSF filed such a petition on January 22, 2009. As petitioner, BNSF carries the burden of proving, by a preponderance of the evidence, that public safety requires closure of the Logen Road grade crossing.
- 5 Prior Commission proceedings demonstrate that in addition to public safety, the Commission may consider the local need for the crossing and alternatives to closure.<sup>3</sup> The Commission has entertained evidence on these topics through analyzing criteria established by the Federal Railroad Administration (FRA) and by BNSF to evaluate the need for a crossing.<sup>4</sup> Further, the Commission has reviewed the Railroad-Highway Grade Crossing Handbook and the factors it sets out as relevant for consideration of a grade crossing.<sup>5</sup>

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<sup>2</sup> In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including Staff. *RCW 34.05.455*.

<sup>3</sup> See *Puget Sound and Pacific Railroad v. Thurston County*, TR-041729, Order 01 (Prehearing Conference Order), 25 January 2005, at ¶6. See also *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 254, 212 P.2d 829 (1949) ("Having found that the grade crossing herein is dangerous and unsafe, we must also consider the convenience and necessity of those using the crossing and whether the need of the crossing is so great that it must be kept open notwithstanding its dangerous condition.").

<sup>4</sup> The FRA-recommended criteria are 1) redundancy of crossings (more than four crossings per mile in urban areas, more than one per mile in rural areas); 2) ability of vehicular traffic to be re-routed safely and efficiently to an adjacent crossing; 3) a high number of collisions at a crossing; and 4) poor visibility. See *BNSF v. City of Sprague*, TR-010684, Third Supplemental Order, 21 October 2002, at ¶ 12, and Fourth Supplemental Order, 10 January 2003, at ¶ 43. The BNSF criteria are 1) redundancy; 2) whether the crossing is a designated emergency route; 3) whether it has low traffic volumes. *Id.*, Third Supplemental Order at ¶ 13 & Fourth Supplemental Order at ¶ 45.

<sup>5</sup> The Handbook factors include: existence of alternative routes within a reasonable travel time and distance from the closed crossing; sufficient capacity in the alternative routes to

6 Upon consideration of the criteria contained in RCW 81.53.060 and the scope of similar proceedings previously conducted by the Commission and related agencies, the undersigned ALJ concludes that in addition to the requirements of public safety, the convenience and necessity of those using the crossing must also be considered, as well as alternatives to closure, if any.

7 Therefore, for the reasons set out above, the issues to be presented at the hearing on the merits in this case shall generally be limited to:

- Requirements of Public Safety
- Convenience and Necessity of Use of Logen Road Crossing
- Alternatives to Closure (if any)

The parties may, within the scope of these issues, introduce evidence addressing the criteria established by the FRA, BNSF, or the above-referenced Handbook.

8 **PETITIONS FOR INTERVENTION.** RCW 34.05.443 permits a presiding officer to grant a petition to intervene at any time, upon a determination that the petitioner qualifies to intervene under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings. WAC 480-07-355(3) allows the presiding officer to grant petitions to intervene when they disclose a substantial interest in the subject matter of the hearing or if the petitioner's participation is in the public interest.

9 One petition to intervene was filed with the Commission prior to the prehearing conference by Lynn Logen of Bellevue, Washington. No additional petitions for intervention were orally presented at the prehearing conference.

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accommodate diverted traffic safely and efficiently; sufficient access over the railroad by emergency vehicles, ambulances, fire trucks and police; frequent use of the crossing by emergency vehicles; economic assessment of the positive and negative impacts of crossing closures. *See* BNSF v. City of Sprague, TR-010684, Third Supplemental Order at ¶ 17, and Fourth Supplemental Order at ¶ 47.

- 10 BNSF opposed the petition for intervention of Lynn Logen and formally objected to his intervention on the basis of lack of standing and failure to state a substantial interest in the case distinguishable from that of the general public. At the conference, Mr. Logen further identified his ownership of parcels of land adjacent and nearby to the affected crossing; BNSF then retracted its objection based upon standing but continued to oppose the petition as without a substantial interest in the matter. Snohomish County expressed no position on Mr. Logen's petition. Commission Staff supported Mr. Logen's petition because the proposed closure would directly affect his ability to access his parcels of property.
- 11 Lynn Logen's petition to intervene expresses a sufficiently specific substantial interest in the subject matter of the hearing to justify his intervention. The Logen family's direct interest as landowners with parcels on both sides of the railway and a history of reliance on the Logen Road crossing for moving farm equipment across the tracks is distinguishable from that of members of the general public. Therefore, the petition to intervene submitted by Lynn Logen is granted.
- 12 **PROTECTIVE ORDER.** A protective order will not be entered in this docket at this time. However, the parties reserved their right to ask that the Commission enter a protective order in this docket under RCW 34.05.446, RCW 80.04.095, WAC 480-07-420 and WAC 480-07-423 to protect the confidentiality of any information identified as proprietary information.
- 13 **DISCOVERY.** The parties jointly requested to invoke the Commission's rule on discovery, WAC 480-07-400(2)(b) and the request was granted. Discovery will proceed in accordance with Commission's rules, WAC 480-07-400 – 425.
- 14 **PROCEDURAL SCHEDULE.** The parties agreed upon a procedural schedule during the conference. The Commission adopts this procedural schedule, which is attached to this Order as Appendix B, and incorporated into the body of this Order by this reference.

- 15 **NOTICE OF TELEPHONIC STATUS CONFERENCE.** The Commission schedules a telephonic pre-hearing status conference in this matter, to commence on **Tuesday, March 24, 2009, at 2:30 p.m.**, in Room 108 of the Commission's headquarters, Richard Hemstad Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. Parties are to call in to the Commission's bridge line (**360-664-3846**) a few minutes before the status conference is scheduled to begin.
- 16 If all parties agree that this status conference is unnecessary, a representative shall contact the presiding ALJ no later than 1:30 p.m. on Monday, March 23, 2009, to request that the status conference be stricken from the Commission's calendar.
- 17 **NOTICE OF HEARING.** The Commission will hold evidentiary hearings in this matter beginning **Monday, March 30, 2009, at 9:00 a.m.**, in the Snohomish County Public Utility District No. 1's Stanwood Office, 9124 – 271<sup>st</sup> Street NW, Stanwood, Washington. As necessary, the evidentiary hearing will conclude the following day, on Tuesday, March 31, 2009.
- 18 **NOTICE OF PUBLIC COMMENT HEARING.** The Commission will hold a public comment hearing in this matter on **Monday, March 30, 2009, at 6:00 p.m.**, also in the Snohomish County PUD No. 1's Stanwood Office, 9124 – 271<sup>st</sup> Street NW, Stanwood, Washington.
- 19 **DOCUMENT PREPARATION AND FILING REQUIREMENTS.** Parties must file an **original plus eleven (11) copies** of all pleadings, motions, briefs, and other prefiled materials. These materials must conform to the format and publication guidelines in WAC 480-07-395 and WAC 480-07-460. The Commission prefers that materials be three-hole punched with *oversized* holes to allow easy handling. The Commission may require a party to refile any document that fails to conform to these standards.
- 20 All filings must be mailed or delivered to the Commission's Executive Director and Secretary, Washington Utilities and Transportation Commission, P.O. Box 47250, 1300 S. Evergreen Park Drive, S.W. Olympia, Washington 98504-7250. Both the post office box and street address are required to expedite deliveries by the U.S. Postal Service.

- 21 **ELECTRONIC SUBMISSION OF DOCUMENTS – FORMAT.** An electronic copy of all filings must be provided through the Commission’s Web Portal ([www.utc.wa.gov/e-filing](http://www.utc.wa.gov/e-filing)) or by e-mail delivery to [records@utc.wa.gov](mailto:records@utc.wa.gov). Alternatively, parties may furnish an electronic copy by delivering with each filing a 3.5-inch IBM-formatted high-density diskette or CD including the filed document(s). Parties must furnish electronic copies in MS Word 6.0 (or later) supplemented by a separate file in .pdf (Adobe Acrobat) format. Parties must follow WAC 480-07-140(5) in organizing and identifying electronic files.
- 22 **ELECTRONIC SUBMISSION OF DOCUMENTS – TIMING.** Electronic submission of documents to the Commission on the filing deadline is permitted to expedite the filing process, so long as the Commission physically receives the original and required number of copies by 12:00 noon on the first business day following the filing deadline established in the procedural schedule. *WAC 480-07-145(6)*. In this matter, parties must submit documents through the Commission’s Web Portal ([www.utc.wa.gov/e-filing](http://www.utc.wa.gov/e-filing)) or by e-mail to [records@utc.wa.gov](mailto:records@utc.wa.gov), and file an **original, plus eleven (11) paper copies**, of the documents with the Commission by the following business day. Finally, to perfect filing, parties must simultaneously provide e-mail courtesy copies of filings to the presiding administrative law judge identified on Appendix A to this Order as well as to the parties to the proceeding.
- 23 **ALTERNATE DISPUTE RESOLUTION.** The Commission supports the informal settlement of matters before it. Parties are encouraged to consider means of resolving disputes informally. The Commission does have limited ability to provide dispute resolution services; if you wish to explore those services, please call Ann E. Rendahl, Director, Administrative Law Division, at (360) 664-1144.
- 24 **NOTICE TO PARTIES: Any objection to the provisions of this Order must be filed within ten (10) days after the service date of this Order, pursuant to WAC 480-07-430 and WAC 480-07-810. Absent such objection, this Order will control further proceedings in this matter, subject to Commission review.**

Dated at Olympia, Washington, and effective February 19, 2009.

**WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION**

**ADAM E. TOREM**  
Administrative Law Judge

<b>APPENDIX A</b>				
<b>PARTIES' REPRESENTATIVES</b>				
<b>DOCKET TR-090121</b>				
<b>PARTY</b>	<b>REPRESENTATIVE</b>	<b>PHONE</b>	<b>FACSIMILE</b>	<b>E-MAIL</b>
<b>BNSF</b>	<b>BRADLEY SCARP</b> <b>KELSEY ENDRES</b> Montgomery Scarp MacDougall, PLLC 1218 Third Avenue, Suite 2700 Seattle, WA 98101	206-625-1801	206-625-1807	<a href="mailto:brad@montgomeryscarp.com">brad@montgomeryscarp.com</a>  <a href="mailto:kelsey@montgomeryscarp.com">kelsey@montgomeryscarp.com</a>
<b>SNOHOMISH COUNTY</b>	<b>JUSTIN W. KASTING</b> <b>MATTHEW A. OTTEN</b> Prosecuting Attorney Civil Division Robert J. Drewel Building 7 <sup>th</sup> Floor M/S 504 3000 Rockefeller Avenue Everett, WA 98201-4060	425-388-6335	425-388-6333	<a href="mailto:jkasting@co.snohomish.wa.us">jkasting@co.snohomish.wa.us</a> <a href="mailto:matthew.otten@co.snohomish.wa.us">matthew.otten@co.snohomish.wa.us</a>
<b>LYNN F. LOGEN</b>	<b>LYNN F. LOGEN</b> 15017 S.E. 43 <sup>rd</sup> Place Bellevue, WA 98006-2413	425-641-1692		<a href="mailto:jvnnludv@aol.com">jvnnludv@aol.com</a>
<b>COMMISSION STAFF</b>	<b>JONATHAN THOMPSON</b> Asst. Attorney General 1400 S Evergreen Park Dr SW P.O. Box 40128 Olympia, WA 98504-0128	360-664-1225	360-586-5522	<a href="mailto:JThompso@utc.wa.gov">JThompso@utc.wa.gov</a>
<b>Admin. Law Judge</b>	<b>ADAM E. TOREM</b> 1300 S Evergreen Park Dr SW P.O. Box 47250 Olympia, WA 98504-7250	360-664-1138	360-664-2654 [ALD fax only – do not use to file]	<a href="mailto:atorem@utc.wa.gov">atorem@utc.wa.gov</a>



**APPENDIX B  
PROCEDURAL SCHEDULE  
DOCKET TR-090121**

<b>EVENT</b>	<b>DATE</b>	<b>INTERVAL</b>
Prehearing Conference	Friday, February 13, 2009	—
Initial Witness/Exhibit Lists	Friday, March 6, 2009	21 days
Supplemental Witness/Exhibit Lists & Cross-Exam Exhibits	Friday, March 20, 2009	14 days
Status Conference (if needed)	Tuesday, March 24, 2009	4 days
Evidentiary Hearing	Monday, March 30, 2009 Tuesday, March 31, 2009	6 days
Public Comment Hearing	Monday, March 30, 2009	—
Closing Arguments / Briefs	To be Determined	—