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November 22, 2006

VIA U.S. MAIL

Carole J. Washburn, Executive Secretary Washington Utilities and Transportation Commission 1300 S. Evergreen Park Drive S.W. P.O. Box 47250 Olympia, WA 98504-7250

RE: WUTC DOCKET NO. TR-061442

WUTC Crossing No.: 2A1673.50U USDOT Crossing No.: 084493W

Dear Ms. Washburn:

Enclosed please find the original and 8 copies of BNSF's Answer and Affirmative Defenses to Petition for Alteration and Relocation of a Highway-Rail Under-Crossing in the above-referenced matter.

Please do not hesitate to call should you have any questions or comments.

Very truly yours,

Montgomery Scarp MacDougall, PLLC

Amy Paden Paralegal

Enclosures

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9	BEFORE THE WAS UTILITIES AND TRANSPORTA	
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11	CHELAN COUNTY,)
12	Petitioner,))
13	VS.) ANSWER AND AFFIRMATIVE
14) DEFENSES TO PETITION FOR ALTERATION AND RELOCATION OF
15	BNSF RAILWAY COMPANY,) A HIGHWAY-RAIL UNDER-) CROSSING
16	Respondent.))
17) WUTC CROSSING NO: 2A1673.50U
18		USDOT CROSSING NO. 084493W
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20	COMES NOW respondent BNSF Railway Company ("BNSF") and, for answer and	
21	affirmative defenses, states, avers and alleges as follows:	ows:
22	1. In response to paragraph 1 of the Petit	ion, BNSF admits that the crossing at issue
23	intersects the roadway known as the "Chumstick Highway" at the approximate milepost and	
24	location referenced in the Petition. BNSF does not a	dmit or deny the remaining allegations but
25	reserves the right to amend its Answer pending furth	er investigation or discovery of the facts.
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- 2. In response to paragraph 2 of the Petition, BNSF admits that the crossing at issue intersects the roadway known as the "Chumstick Highway" at the approximate milepost and location referenced in the Petition.
- 3. In response to paragraph 3 of the Petition, BNSF admits that the rail line includes a main line used by both passenger and freight trains at the estimated speeds and volumes stated in the Petition. BNSF does not admit or deny the remaining allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 4. In response to paragraph 4 of the Petition, BNSF lacks sufficient information to respond affirmatively and as such does not admit or deny the allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 5. In response to paragraph 5 of the Petition, BNSF lacks sufficient information respond affirmatively and as such does not admit or deny the allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 6. In response to paragraph 6 of the Petition, BNSF admits that the Chumstick Highway passes under the railroad trestle in question. BNSF does not admit or deny the remaining allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 7. In response to paragraph 7 of the Petition, BNSF admits that Chelan County has proposed altering and relocating the crossing and that County officials and BNSF have met to discuss the issues involved. BNSF does not admit or deny the remaining allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 8. In response to paragraph 8 of the Petition, BNSF does not admit or deny the allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 9. In response to paragraph 9 of the Petition, BNSF does not admit or deny the allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.

- 10. In response to paragraph 10 of the Petition, BNSF does not admit or deny the allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.
- 11. In response to paragraph 11 of the Petition, BNSF admits that Chelan County officials and BNSF representatives have met to discuss some of the issues involved in the proposed alteration and relocation of the railroad facility, including certain cost estimates. BNSF lacks sufficient information regarding the reference in the Petition to "the county's share of the cost." BNSF does not admit or deny the remaining allegations but reserves the right to amend its Answer pending further investigation or discovery of the facts.

Affirmative Defenses

- 1. <u>Jurisdiction</u>. The railroad bridge in question that crosses over the Chumstick Highway is a serviceable "railroad facility" within the meaning of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. 10501, *et seq.*, which vests exclusive jurisdiction over railroad facilities in the Surface Transportation Board ("STB"). 49 U.S.C. 10501(b)(2). Accordingly, BNSF respectfully contends that the Commission does not have jurisdiction over the railroad facility.
- 2. <u>Authority</u>. Due to the exclusive jurisdiction of the STB over railroad facilities, in addition to the uncertainty relating to land acquisition required for the proposed project, BNSF respectfully submits that the Commission lacks authority to grant the relief sought by the Petitioner.
- 3. <u>Taking</u>. Without additional information, which BNSF will request through discovery, BNSF contends the relief sought by Petitioner may constitute a taking if not based on full and proper compensation under Washington State and federal law.
- 4. <u>Ripeness</u>: Without waiving the defense of lack of jurisdiction, BNSF respectfully submits that the relief sought in the Petition is not ripe for review unless and until the matter has been brought before and adjudicated by the STB.

1	BNSF reserves the right to supplement its Affirmative Defenses as additional information	
2	is obtained.	
3	Prayer For Relief	
4	1. BNSF requests a preliminary hearing on the issues raised in this Answer.	
5	2. BNSF requests a stay of proceedings due to lack of jurisdiction or any other	
6	affirmative defenses raised.	
7	3. BNSF requests a stay of any proceedings by the Commission on this matter unless	
8	and until it has been brought before and adjudicated by the STB.	
9	4. BNSF acknowledges that the parties have been in communication regarding the	
10	proposal set forth in the Petition and believes that further discussions are warranted. BNSF	
11	believes that the parties will benefit from further direct communications regarding the Petition,	
12	or in the alternative a mediation proceeding.	
13	Certification: I certify under penalty of perjury that the foregoing is true and correct based	
14	on my knowledge and information of the matters set forth herein.	
15	DATED this 22nd day of November, 2006.	
16	Montgomery Scarp MacDougall, PLLC	
17	Wontgomery Bears Water Ougan, TELC	
18	Tom Montgomery, WA/Bar No. 19998	
19	Bradley Scarp, WA. Bar No.21453	
20	Leslie Fleming, WA. Bar No. 32368 Of Attorney for Defendant	
21	BNSF Railway Company 1218 Third Ave., Ste. 2700	
22	Seattle, WA 98101 Tel. (206) 625-1801	
23	Fax (206) 625-1807 Tom@montgomeryscarp.com	
24	Brad@montgomeryscarp.com	
25	<u>Lesley@montgomeryscarp.com</u>	
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1	CERTIFICATE OF SERVICE
2	I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall,
3	PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101. I hereby certify that true and complete copies of defendant's BNSF's Answer and Affirmative Defenses to Petition has been sent
4	via U.S. Mail to the following interested parties:
5	Carole J. Washburn, Executive Secretary (Original and 8 copies) Washington Utilities and Transportation Commission
6	1300 S. Evergreen Park Drive S.W. P.O. Box 47250
7	Olympia, WA 98504-7250 Fax: (360) 586-1150
8	Gary A. Riesen (one copy)
9	Chelan County Prosecuting Attorney Louis N. Chernak
10	Chelan County Prosecuting Attorney's Office 401 Washington Street, 5 th Floor
11	P.O. Box 2596 Wenatchee, WA 98807
12	Fax: (509) 667-6490
13	I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.
14	DATED this 22 nd day of November, 2006 at Seattle, Washington.
15	Amy Paden, Legal Assistant
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